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ABSTRACT

This report examines the civil consequences of criminal records on ex-offender parents and their long-term ability to reintegrate into the community, resume parental responsibilities, and be productive members of the society. Many of the barriers described in this report are the results of policies intended to reduce crime, yet they have the effect of creating unemployment and homelessness, and guaranteeing failure. After an introduction by Amy E. Hirsch, the six chapters are: (1) "Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families" (Sharon M. Dietrich); (2) "Parents with Criminal Records and Public Benefits: 'Welfare Helps Us Stay in Touch with Society'" (Amy E. Hirsch); (3) "Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter" (Rue Landau); (4) "Criminal Convictions, Incarceration, and Child Welfare: Ex-Offenders Lose Their Children" (Peter D Schneider); (5) "Student Loans and Criminal Records: Parents with Past Drug Convictions Lose Access to Higher Education" (Irv Ackelsberg and Amy E. Hirsch); and (6) "Divided Families: Immigration Consequences of Contact with the Criminal Justice System" (Judith Bernstein-Baker and Joe Hohenstein). (Chapters contain endnotes.) (SM)

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# Every Door Closed

## Barriers Facing Parents With Criminal Records

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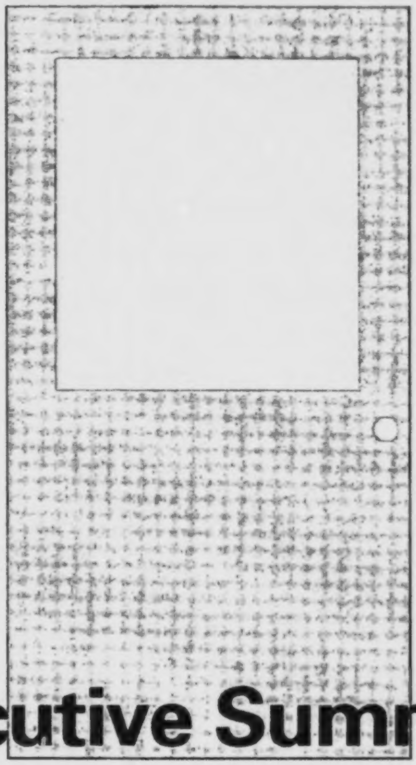

# Executive Summary

Over 10 million children in the United States "have parents who were imprisoned at some point in their children's lives."[1] In 2001, approximately 400,000 mothers and fathers will finish serving their prison or jail sentences and return home eager to rebuild their families and rebuild their lives.

As these parents struggle to make a fresh start, they will encounter a myriad of legal barriers that will make it extraordinarily difficult for them to succeed in caring for their children, finding work, getting safe housing, going to school, accessing public benefits, or even, for immigrants, staying in the same country as their children. This report examines some of the barriers that, singly and in combination, tear families apart, create unemployment and homelessness, and guarantee failure, thereby harming parents and children, families, and communities.

An individual experiencing any one of these problems is likely to find that it dominates his or her life. But an ex-offender might well confront several of these issues simultaneously. Sometimes these problems exacerbate each other. For instance, a parent who cannot find stable housing is unlikely to find or keep employment or reunify his or her family. An ex-offender without income because of ineligibility for public benefits and lack of employment is unlikely to find stable housing. Cumulatively, these civil consequences of a criminal record can be devastating and will continue to punish an ex-offender — and his or her family — long after his or her formal sentence has been served.

The report contains an introduction with background information on parents with criminal records, and chapters on employment, public benefits, housing, child welfare, student loans, and immigration. These chapters feature stories of ex-offenders who have confronted these barriers, illustrating the inequities of these collateral consequences.

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[1] Charlene Wear Simmons, *Children of Incarcerated Parents*, 7(2) California Research Bureau Note 2 (March 2000).

## Employment

Parents with criminal records, like other parents, need jobs to support their families and to be part of mainstream society. However, ex-offenders' criminal records typically create an employment barrier for the rest of their lives.

- Criminal records result in legal prohibitions against employment in certain occupations. These legal restrictions vary greatly from state to state. An occupation in which employment of ex-offenders is strictly prohibited in one state may be subject to a licensing procedure in which evidence of rehabilitation is considered in another state, and not subject to any regulation at all in a third. Some states may establish a lifetime bar on employment; others may restrict employment for a limited number of years.
- In professions in which criminal records are not the subject of regulation, employers nevertheless often refuse to hire or retain persons with criminal records. Employers can easily obtain criminal records on job applicants, and ex-offenders have great difficulty finding work, even many years after completing their sentences.

### Policy Recommendations: Improving Employment Prospects of Ex-Offender Parents

- Avoid overbroad, blanket employment prohibitions on ex-offenders that are created by law.
- Publicize and enforce existing laws limiting employer consideration of criminal records and enact new laws to protect ex-offenders.
- Improve bonding and tax credit programs to encourage employers to hire ex-offenders.
- Increase resources for employment programs for ex-offenders.
- Assist rehabilitated ex-offenders in finding work by expunging offenses, sealing records, offering certificates of rehabilitation, and/or revising pardon standards and procedures.
- Strengthen employment conditions in the low-wage labor economy.

## Public Benefits

Parents who are reentering the community after incarceration often need public benefits in order to reunify their families, pay rent, and buy food, clothing, and other necessities. Some parents with criminal records have disabilities that prevent them from working. Others can work but need assistance until they are able to find a job. Yet parents with criminal records face serious barriers in accessing the public benefits that they need to rebuild their families and move forward with their lives.

- The 1996 federal "welfare reform" law imposed a lifetime ban on Temporary Assistance for Needy Families (TANF) and Food Stamp benefits for people with felony drug convictions for conduct after August 22, 1996 — regardless of their circumstances or subsequent efforts at rehabilitation — unless their state affirmatively passes legislation to opt out of the ban.
- Parents with certain kinds of ongoing problems with the criminal justice system (outstanding felony bench warrants or in violation of probation or parole) are ineligible for Food Stamps, Supplemental Security Income (SSI), or TANF until those problems are resolved.

- Parents with criminal records may have particular difficulties complying with TANF and Food Stamp work requirements.
- Caseworker confusion and stringent "verification" requirements result in parents wrongly being denied benefits because of their criminal records.
- Welfare department requirements concerning work, child support enforcement, and verification may directly conflict with court-ordered probation or parole conditions or with other demands of the criminal justice or child welfare systems. As a result, parents may be forced to choose between doing what is required to get or keep welfare benefits and doing what is required to recover from alcoholism or drug dependence, retain or regain custody of their children, or stay out of jail.
- In a vicious cycle, losing public benefits is likely to make it harder for parents with criminal records to stay clean and sober, avoid abusive relationships, take care of their children, and resist engaging in criminal activity.

### Policy Recommendations: Improving Access to Public Benefits for Ex-Offender Parents

- Allow individuals with criminal records for offenses other than public assistance fraud to receive public benefits if they are otherwise eligible.
- Allow pre-employment activities, including alcohol and drug treatment and mental health treatment, to count as work activities.
- Develop programs to process public benefits *rapidly* for eligible individuals who are leaving prisons or jails, so that they can more appropriately reenter the community and lessen their chances of a revolving-door return to jail.
- Create targeted welfare-to-work programs that address the needs of parents with criminal records, recognizing that they must meet often conflicting requirements of the welfare, child welfare, and probation systems.

## Housing

Safe, decent, and affordable housing is critical to the well-being of parents and children. Parents returning to the community after incarceration will be unable to regain custody of their children if they cannot find appropriate housing. Lack of stable housing makes it very difficult for parents to find work and for children to concentrate in school. Yet families in which any member (or even a guest) has a criminal record may be unable to rent an apartment, or may face eviction, often without consideration of mitigating circumstances. Chapter Three examines the federal "one strike and you're out" policy concerning subsidized housing.

### Policy Recommendations: Improving Access to Housing

- Require Public Housing Authorities to evaluate evictions and admissions on a case-by-case basis, to look to mitigating circumstances, and to weigh fully the consequences of a loss of subsidized housing for the family.
- For families with children, Public Housing Authorities should use the "best interest of the child" standard when determining whether to grant admission to an ex-offender or to evict families based on criminal activity.[2]
- Congress should supply sufficient funding to substantially increase the stock of subsidized housing so that parents reentering the community after their incarceration can begin to rebuild their lives.

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[2] Barbara Sard, Center for Budget and Policy Priorities, *Memorandum re: Housing Proposals Related to TANF Reauthorization and Support for Working Families* (Jan. 18, 2002).

## Child Welfare

Any parent who goes to prison, even for a short time, faces the grave risk of losing his or her children forever. Many parents will leave prison having served their time but facing a far worse sentence: the imminent loss of all rights as parents and all contact with their children. Many other parents will have lost their parental rights before their release. To protect their parental rights, incarcerated parents must work consistently, and against difficult barriers, both while in prison and afterwards. Because a parent's ability to preserve parental rights after release can be critically affected by decisions made and actions taken while the parent is still incarcerated, Chapter Four addresses the ways in which the law affects parents during the period of incarceration as well as after release.

* Conviction of a crime or incarceration does not mean that a parent cannot continue a loving, committed relationship with his or her child. As one court has noted, "While 'use a gun, go to prison' may well be an appropriate legal maxim, 'go to prison, lose your child' is not."[3]
* Children as well as parents are affected by the dissolution of their families. Many children in foster care, especially older children, value their relationships with their parents and "[derive] considerable strength" from them.[4] It is important to these children that the relationship be sustained wherever possible. "Legally severing these children's ties with their parents will not erase their emotional connection, nor will adoption make their biological parents disappear from their hearts and minds."[5]
* No matter how a parent comes into contact with the child welfare system, the consequences can be harsher and the goal of family preservation or reunification more difficult to achieve when the parent has the added burden of a criminal record.

## Policy Recommendations: Strengthening Families

Laws and policies must change to allow incarcerated parents to be able to maintain their ties to their children, so that their children will not forever lose the opportunity to know and have a loving relationship with their parents.

* States should make appropriate services available to incarcerated parents and their families including:
  - Actively encouraging kinship care placements.
  - Ensuring that child welfare authorities remain in touch with incarcerated parents.
  - Facilitating visitation between children and incarcerated parents.
  - Making appropriate reunification services available to incarcerated parents.
  - Exploring alternatives to incarceration that could make child welfare intervention and child removal unnecessary in many cases.
* States should avoid overly broad application of the law and ensure that decisions are made based on the facts of each case, including:
  - Avoiding overly broad termination statutes and statutory interpretation.
  - Applying the Adoption and Safe Families Act's time deadlines flexibly.
  - Offering relief from child support obligations to parents who are returning from incarceration and seeking reunification with their children.

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[3] *In re Brittany* S., 17 Cal. App. 4th 1399, 1402 (Cal. Ct. App. 1993), *rev. den.* 1993 Cal. LEXIS 6444 (1993).

[4] Malcolm Bush and Andrew C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, in 27 Social Work 309, 310 (1982), cited in Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002) at 160.

[5] Roberts, *supra*, at 160. The phrase "these children" refers specifically to a study of children in foster care between the ages of nine and 18, a majority of whom stated that they did not want to be adopted.

- States must scrupulously respect procedural fairness and ensure that termination procedures comply with requirements of due process, including:
  - Ensuring that incarcerated parents have the opportunity to attend all hearings in their cases.
  - Providing incarcerated parents with counsel at all stages of their child welfare cases.

## Student Loans

Access to higher education is important for low-income parents who are trying to improve their ability to support their families. For many working parents, a return to school may be a matter of economic necessity. For ex-offender parents, who face additional difficulties finding work in the low-wage sector, the decision to enroll in college can represent an enormously powerful opportunity to enter mainstream society. No matter how positive such a step might be — not only for the parent and her children, but also for society at large — the ex-offender seeking to enroll in college may find yet another door closed to her, the door to federal financial aid.

- As part of its 1998 reauthorization of the Higher Education Act of 1965, Congress enacted a complicated eligibility restriction applicable to students who have prior convictions for possession or sale of controlled substances.
- Applicants subject to this bar cannot obtain Pell grants or student loans, which, for low-income students, effectively means a denial of higher education. *The New York Times* reported on December 29, 2001, that "[m]ore than 43,000 college students face possible denials of federal aid this [school] year" as a result of the 1998 ban.[6]
- Even applicants not technically subject to the bar may be discouraged from applying for financial aid as a result of misinformation, bad advice, or wrong assumptions about how the new law works.

### Policy Recommendation: Allow Access to Student Loans

- Repeal the ban on student financial aid. If we want ex-offender parents to reintegrate fully into their communities, to find sustainable employment, and to care for and encourage the education of their children, then we should support their efforts to further their own education.

## Immigration

The intersection of immigration law and criminal law, particularly in the wake of 1996 changes to federal immigration law, leaves many ex-offender parents facing the loss of a fundamental "benefit" — the ability to live in the United States with their families. An increasing list of over 50 different crimes can now trigger deportation.

- Immigrant parents become entangled in the criminal justice/immigration systems in a number of ways. A lawful permanent resident may legally leave the country to visit relatives and, upon return, be apprehended by Immigration and Naturalization Service (INS) border officers for crimes from the past. The apprehension is *not* based on outstanding warrants, but rather on any record of a prior conviction that can *now* be considered grounds for removal. Likewise, an immigrant who is applying for lawful permanent residence or citizenship can be placed in removal if the application or fingerprint check reveals a criminal history.

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[6] Associated Press, *43,000 Students With Drug Convictions Face Denial of Aid*, N.Y. Times, Dec. 29, 2001, at A11.

- Alternatively, an immigrant may run afoul of the system beginning with a law enforcement encounter. If prior criminal history or undocumented status appears in the course of a law enforcement background check, then the person will be placed in deportation proceedings.

## Policy Recommendations: Keeping Families Together

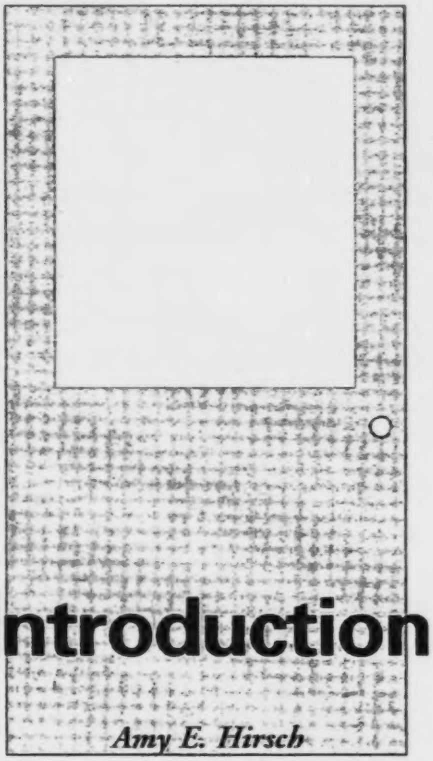
- Federal law should be amended to help keep families together by:
    - Restoring the possibility of a grant of relief by immigration judges during the deportation process.
    - Reducing the number of crimes for which deportation is imposed.
    - Reinstating eligible immigrants' ability to apply for bond and parole.
    - Limiting the circumstances in which mandatory detention is required.
- Helpful administrative changes have been announced by the INS but will need careful implementation and monitoring.
- Low-income immigrants need access to legal counsel on these issues, and immigrant communities need education about the current immigration laws.
- Initiatives that encourage the exchange of information among criminal lawyers, immigration lawyers, and immigration service providers should be supported.

## Conclusion

In this report, we examine the civil consequences of criminal records — not the sentence imposed by a judge for a crime but rather the ancillary effects of which the judge, defendant, prosecutor, and defense attorney may all be unaware. However, these civil consequences have a tremendous impact on the long-term ability of ex-offender parents to reintegrate into the community, resume parental responsibilities, and be productive members of society.

Many of the barriers described in this report are the result of policies intended to reduce crime and enhance community security. Yet they have the ironic and counter-productive effect of making it more difficult for parents with criminal records to successfully reenter the community, and making it less likely that they will be able to take care of their children and avoid criminal activity.

The barriers that ex-offenders experience — to getting a job, renting an apartment, getting a student loan, regaining custody of children from the child welfare system, accessing basic public benefits, or staying in this country — make it virtually impossible to resume a normal life after even minor offenses. The cumulative impact of these barriers is that every door is closed to parents with criminal records.



# Introduction

*Amy E. Hirsch*

Approximately 1.5 million children in the United States — 2.1 percent of all children under 18 — have parents in state or federal prison.[1] Including those children with parents on parole and probation, the number is closer to 5 million,[2] and over 10 million children "have parents who were imprisoned at some point in their children's lives."[3] In 2001, approximately 400,000 mothers and fathers will finish serving their prison or jail sentences and return home eager to rebuild their families and rebuild their lives.[4] As they struggle to make a fresh start, they will encounter a myriad of legal barriers that will make it extraordinarily difficult for them to succeed in caring for their children, finding work, getting safe housing, going to school, accessing public benefits, or even, for immigrants, staying in the same country as their children. This report examines some of the barriers that, singly and in combination, tear families apart, create unemployment and homelessness, and guarantee failure, thereby harming parents and children, families, and communities.

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[1] Christopher J. Mumola, *Special Report: Incarcerated Parents and Their Children* 1 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2000) (hereinafter "Mumola"). This number does *not* include children whose parents are in local jails. In 1999, the number of *parents* incarcerated in state and federal prisons was estimated at 721,500. *Id.* Because there are many criminal justice systems (local, state, and federal) in the United States, complete and accurate accounts of the number of individuals affected are not available. We have relied on a variety of estimates, primarily from the U.S. Department of Justice, Bureau of Justice Statistics.

[2] "Prisoner Reentry Intersects with Welfare Initiatives," *The Welfare Reporter* 6 (Nov. 2000). At least 4 million parents were on probation or parole at the end of 2000 or had completed probation or parole during 1999 or 2000. This estimate was derived from data contained in several Bureau of Justice Statistics reports, as described below.

[3] Charlene Wear Simmons, *Children of Incarcerated Parents*, 7(2) California Research Bureau Note 2 (March 2000).

[4] Approximately 600,000 individuals will be released from prison during 2001. Jeremy Travis, Amy L. Solomon, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 7 (Urban Institute, June 2001) (hereinafter "Travis"). About two-thirds of the "soon-to-be-released prisoner population in 1997" had children. Lynch and Sabol, "Prisoner Reentry in Perspective" (forthcoming), cited in Travis, *supra*, at 38. According to data from the Bureau of Justice Statistics, 56 percent of incarcerated adults are parents of minor children. Mumola, *supra* note 1, at 1.

In this report, we examine the civil consequences of criminal records — not the sentence imposed by a judge for a crime but rather the ancillary effects of which the judge, prosecutor, and defense attorney may all be unaware. These civil consequences, we will show, have a tremendous impact on the long-term ability of ex-offender parents to reintegrate into the community, resume parental responsibilities, and be productive members of society.

We first describe the population of parents with criminal records and their affected children. We then analyze the legal barriers that ex-offender parents face in their efforts to access employment, housing, public benefits, and student loans, to retain or regain custody or visitation of children from the child welfare system, and to remain in the United States, and offer policy recommendations to address those barriers.

Some issues facing ex-offender parents are beyond the scope of this report. The most well-known barrier faced by ex-offenders, namely the loss of voting rights for individuals with felony convictions in many jurisdictions, is not discussed in this report, precisely because it is already the subject of significant public attention.[5] We also do not address child support issues[6] or custody disputes between parents, nor do we discuss barriers that are directly linked to the type of crime committed.[7] Instead, our focus is on issues where the nexus between the crime committed and the bar in civil life is remote and the rationale for the prohibition is tenuous. If we believe in rehabilitation, and if we want parents with criminal records to reintegrate into the community successfully, then we need to examine barriers to reintegration very closely.

The barriers that ex-offenders experience — to getting a job, renting an apartment, getting a student loan, regaining custody of children from the child welfare system, accessing basic public benefits, or staying in this country — make it virtually impossible to resume a normal life after even minor offenses.[8] The cumulative impact of these barriers is that every door is closed to parents with criminal records.

Many of the examples we provide are from Pennsylvania, although similar problems exist in every state, and the examples we use are simply illustrative of widespread issues. Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

[5] An estimated 3.9 million Americans (one in fifty adults) are disenfranchised as a result of felony convictions, including 1.4 million (one in seven) African-American men. Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (The Sentencing Project, 1998). *See also* Patricia Allard and Marc Mauer, *Regaining the Vote: An Assessment of Activity Relating to Felony Disenfranchisement Laws* (The Sentencing Project, 1999); Office of the Pardon Attorney, U.S. Department of Justice, *Civil Disabilities of Convicted Felons: A State-by-State Survey* (Oct. 1996).

[6] Child support orders often continue to accrue during incarceration, and both custodial and non-custodial parents may find themselves owing support to the welfare department and/or child welfare system for the costs of TANF or foster care benefits received by their children while the parents were incarcerated. "[N]oncustodial parents who are being released from prison ... are often poor, homeless, and struggling to support themselves. Many of these parents have child support arrearages and orders larger than they can reasonably manage, which compounds their difficulties.... [W]hen a parent is released, there is typically a huge gap between the amount that is owed and the amount that the parent is able to pay." Heidi Sachs, *Support Services for Incarcerated and Released Non-Custodial Parents* 1 (Welfare Information Network, June 2000). *See also* Jessica Pearson and Chris Hardaway, *Designing Programs for Incarcerated Parents and Paroled Obligors* (Welfare Information Network, Aug. 2000). Some states have established systems to suspend or reduce child support orders or to waive arrears that accrue for low-income parents during a period of incarceration. *See* Paula Roberts, *An Ounce of Prevention and A Pound Of Cure: Developing State Policy on the Payment of Child Support Arrears by Low-Income Parents* (Center for Law and Social Policy, May 2001).

[7] For example, individuals who are convicted of securities fraud may be barred from working as securities traders, or individuals who are convicted of child sexual abuse may be barred from working in child care centers.

[8] We also do not discuss prohibitions that are less likely to affect low-income individuals. For example, the Denial of Federal Benefits Program, established under section 5301 of the Anti-Drug Abuse Act of 1988 (P.L. 100-690), permits federal and state courts to deny individuals convicted of drug offenses a range of federal benefits, including Federal Aviation Administration licenses for pilots, Federal Communications Commission licenses for broadcasters, and Small Business Administration loans or the ability to be federal contractors. U.S. Department of Justice, Bureau of Justice Assistance, *Denial of Federal Benefits Program and Clearinghouse* (Nov. 1995).

## How Many Parents Have Criminal Records?

In 2000, almost 6.5 million adults were under the supervision of the correctional system. Over 4.5 million of these individuals were on probation or parole, and approximately 1.93 million were incarcerated.[9] In addition, over 2.6 million adults successfully completed probation or parole and were discharged from supervision during 1999-2000 alone.[10] An estimated 56 percent of incarcerated adults are parents of minor children, and the percentage of parents among the population on probation is probably even greater.[11] Thus, a conservative estimate would be that 4 million parents were on probation or parole at the end of 2000 or had successfully completed probation or parole during 1999 or 2000.[12]

We call this figure "conservative" for several reasons. First, the total number of individuals under the supervision of the criminal justice system has likely continued to increase since 2000.[13] Second, this estimate does not include teen parents who are incarcerated or on probation through the juvenile court system. Neither does this estimate include adult parents who have completed probation or parole, or "maxed out" (served their entire sentences while incarcerated) before 1999, and have had no further involvement with the criminal justice system, but whose criminal records continue to affect their lives. We don't know how many people in the United States have criminal records,[14] let alone how many of them are parents. A survey conducted by SEARCH for the federal Bureau of Justice Statistics found that "more than 59 million individual offenders were in the criminal history files of the State central repositories as of December 31, 1999" and that the FBI had criminal record information for more than 48 million individuals.[15] These figures are probably over-inclusive — one individual may have records in multiple states, and the FBI records include both individuals with federal criminal records and individuals reported to the federal criminal records system by the states, with no indication as to how many of the files are duplicative.[16] Still, it is clear that many millions of Americans have criminal records of some sort. A recent report issued by the U.S. Department of Labor concluded that "about 25 percent of the nation's adult population live a substantial portion of their lives having a criminal record."[17]

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[9] 3,839,532 adults were on probation, and 725,527 were on parole, for a total of 4,565,059 adults on probation or parole. 1,312,354 adults were in federal or state prisons and 621,149 were in local jails, for a total of 1,933,503 incarcerated adults. U.S. Department of Justice, Bureau of Justice Statistics, *National Correctional Population Reaches New High — Grows By 126,400 During 2000 to Total 6.5 Million Adults* (Aug. 26, 2001, revised Aug. 28, 2001), at www.ojp.usdoj.gov/bjs/abstract/ppus00.htm.

[10] 1,184,449 adults successfully completed probation and 197,547 successfully completed parole during 2000, for a total of 1,381,996. Id. 1,053,700 adults successfully completed probation and 177,300 successfully completed parole during 1999, for a total of 1,231,000. U.S. Department of Justice, Bureau of Justice Statistics, *U.S. Correctional Population Reaches 6.3 Million Men and Women, Represents 3.1% of the Adult U.S. Population* (July 23, 2000).

[11] One study found that two-thirds of soon-to-be-released prisoners have children. Lynch and Sabol, *supra* note 4.

[12] The estimate of 4 million parents on probation or parole at the end of 2000 or who had successfully completed probation or parole in 1999-2000 was calculated by adding together the 4.5 million adults on probation or parole at the end of 2000 and the 2.6 million adults who completed probation or parole in 1999-2000, making a total of 7.1 million adults, and assuming that 56 percent of them were parents. *See* Mumola, *supra* note 1, and note 4 *supra*.

[13] From 1986 to 1996 the probation population grew by an average of 4.2 percent annually. U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States*, 1996 (April 1999).

[14] Federal regulations define "criminal history record information" to include arrests, detentions, criminal charges, the disposition of charges, sentencing, correctional supervision, and release. 28 C.F.R. § 20. Not all individuals with criminal records have convictions. Some individuals with criminal records were arrested but never charged with crimes; others were charged with crimes and the charges were subsequently dropped; still others were tried and acquitted.

[15] U.S. Department of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report 2001 Update 30-31* (Dec. 200[illegible]).

[16] The quality of criminal record data is often questionable — in some states these records include, for example, arrests that did not result in criminal charges. At least 17 states do not require that the central repository be notified when an arrested individual is released without criminal charges. *Id.* at 153-155 (Appendix 14). Both the state and federal systems leave "room for improvement" because of backlogs in entering data, particularly concerning disposition of cases, and problems with timeliness, accuracy, and completeness. The few audits that have been done of the accuracy of criminal records "have found unacceptable levels of inaccuracies." *Id.* at 3, 38-39.

## Background Information on Parents With Criminal Records

### Gender

Largely as a result of the war on drugs, the number of parents incarcerated in the U.S. has soared in recent decades — and more of them are mothers.[18] After remaining steady from 1925 to 1973, the rate at which Americans were imprisoned more than quadrupled over the next 16 years, rising from 110 per 100,000 U.S. residents in 1973 to 476 per 100,000 U.S. residents in 1999.[19]

The gender of ex-offender parents is important because women are more likely than men to have been custodial parents prior to incarceration.[20] Although men still make up over 90 percent of the prisoner population in the United States, the number of women imprisoned has increased dramatically.[21] Between 1990 and 1996, the number of women convicted of felonies in state courts grew at over twice the rate of increase for men,[22] and the population of women in prison now is about six times what it was in 1980.[23]

While men are still the large majority — 93 percent — of the estimated 721,500 parents with minor children who were incarcerated in state and federal prisons in 1999, mothers are represented in greater numbers throughout the rest of the correctional system. While the number of parents held in local jails is unknown, it is clear that women constitute a higher proportion of the individuals in local jails than in prisons.[24] Women made up almost one-quarter of all adults on probation, and 12 percent of adults on parole, in both 1999 and 2000.[25] Overall, more than 1 million women were under the supervision of the criminal justice system in 2000.[26]

An estimated 65 percent of adult women in state prisons have minor children,[27] and these children are often very young. Approximately 25 percent of incarcerated women are either pregnant during their incarceration, or have had a baby within the previous 12 months.[28] An estimated 70 percent of women in local jails and 72 percent of women on probation have young children.[29]

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[17] Debbie Mukamal, *From Hard Time to Full Time: Strategies to Help Move Ex-Offenders from Welfare to Work* 3 (U.S. Department of Labor, Employment and Training Administration, Division of Welfare-To-Work, June 2001), http://www.doleta.gov/documents/hard.html.

[18] Marc Mauer, Cathy Potler, and Richard Wolf, *Gender and Justice: Women, Drugs, and Sentencing Policy* (The Sentencing Project, Nov. 1999).

[19] The per capita rate of imprisonment was about 110 per 100,000 from 1925 to 1973. "In 1999, 476 persons per 100,000 residents were sentenced to at least a year's confinement." Travis, *supra* note 4, at 4. When all incarcerated individuals (not just those sentenced to a term of one year or more) are included, the incarceration rate in 1999 was 691 persons per 100,000 residents. Allen J. Beck and Paige M. Harrison, *Prisoners in 2000* 2 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2001) (hereinafter "Beck & Harrison").

[20] Mumola, *supra* note 1.

[21] At the end of 2000, there were 1,290,280 men and 91,612 women in state or federal prisons. Beck & Harrison, *supra* note 19, at 1.

[22] Lawrence A. Greenfeld and Tracy L. Snell, *Women Offenders* 5 (U.S. Department of Justice, Bureau of Justice Statistics, Dec. 1999) (hereinafter "*Women Offenders*").

[23] "The number of women imprisoned in the United States tripled during the 1980s," Meda Chesney-Lind, *The Female Offender: Girls, Women and Crime* 145 (1997), and, since 1990, the number of women in state and federal prisons more than doubled. Beck & Harrison, *supra* note 19, at 1.

[24] Women were 11 percent of adults in local jails and 6 percent of adults in prisons in 1998. *Women Offenders*, *supra* note 22, at 6.

[25] *National Correctional Population Reaches New High*, *supra* note 9; *U.S. Correctional Population Reaches 6.3 Million Men and Women*, *supra* note 10.

[26] Of these, 930,000 were on probation or parole. *National Correctional Population Reaches New High*, *supra* note 9. An additional 91,612 were incarcerated in state or federal prison. Beck & Harrison, *supra* note 19, at 1. This figure does not include women held in local jails.

[27] Mumola, *supra* note 1.

[28] Ellen Barry with River Ginchild and Doreen Lee, "Legal Issues for Prisoners with Children," in Katherine Gabel and Denise Johnston, eds., *Children of Incarcerated Parents* 149 (1995) (hereinafter "Gabel & Johnston").

[29] *Women Offenders*, *supra* note 22, at 7.

## Race

African-American and Hispanic families are disproportionately affected by parental incarceration, according to the Federal Bureau of Justice Statistics:

> Of the nation's 72.3 million minor children in 1999, 2.1 percent had a parent in State or Federal prison. Black children (7.0 percent) were nearly 9 times more likely to have a parent in prison than white children (0.8 percent). Hispanic children (2.6 percent) were 3 times as likely as white children to have an inmate parent.[30]

One source of this disproportion is that African-Americans are far more likely to have criminal records than whites. Another is that, among individuals with criminal records, whites are more likely to be sentenced to probation and African-Americans are more likely to be incarcerated. According to the U.S. Department of Justice, "[w]hile nearly two-thirds of women under probation supervision are white, nearly two-thirds of those confined in local jails and State and Federal prisons are minority — black, Hispanic, and other races."[31] At the end of 1999, 46 percent of adult prisoners with sentences of more than one year were black, 33 percent were white, and 18 percent were Hispanic.[32]

## Parents Facing Multiple Barriers

Much of the data presented in this introduction focuses on parents who are in prison, but, of course, most incarcerated parents will eventually be released. Because of the large numbers of parents on probation or parole, or who have completed probation or parole, "most children who have experienced parental incarceration do not have a currently incarcerated parent."[33] Most parents who are reentering the community after incarceration face multiple barriers in addition to their criminal records. They are overwhelmingly poor, with limited educations and limited job skills, and often have alcohol or drug problems, histories of being physically and/or sexually abused, mental and/or physical health problems, and homelessness.[34] Seventy percent of parents in state prisons don't have high school diplomas.[35]

Mothers leaving jails report multiple reentry problems, including problems finding shelter, transportation, drug or alcohol treatment, employment, or job training; emotional problems; and problems in child custody and family relationships.[36] They and their children have experienced the trauma of separation due to arrest and incarceration, often at great distances from each other and with extremely limited opportunities for visitation. One study of children whose mothers were in prison found that 70 percent of the children were present at their mothers' arrests, and 75 percent reported symptoms of post-traumatic stress.[37] In addition to the immediate problems of reentry, parents with criminal records face the long-term civil legal barriers that are the subject of this report.

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[30] Mumola, *supra* note 1, at 2. Nearly half of all imprisoned parents are black, about a quarter are white, and about a quarter are Hispanic. *Id.* at 3.

[31] *Women Offenders, supra* note 22, at 7.

[32] Allen J. Beck, *Prisoners in 1999* 9 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2000).

[33] Denise Johnston, "Effects of Parental Incarceration," in Gabel & Johnston, *supra* note 28, at 59.

[34] Travis, *supra* note 4; Mumola, *supra* note 1; Angela Browne, Brenda Miller, and Eugene Maguin, "Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women," 22 *Intl J Law & Psych* 301 (1999); Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers* (U.S. Department of Justice, Bureau of Justice Statistics, April 1999).

[35] Mumola, *supra* note 1, at 3.

[36] Denise Johnston, "Jailed Mothers," in Gabel & Johnston, *supra* note 28, at 48. A similar range of problems, including difficulty accessing physical and mental health services, are faced by mothers and fathers upon release from state and federal prisons. Travis, *supra* note 4.

[37] Christine Jose Kampfner, *Post-Traumatic Stress Reactions in Children of Imprisoned Mothers*, in Gabel & Johnston, *supra* note 28, at 95.

This report was largely written before the tragic events of September 11, 2001. Those events have already resulted in heightened scrutiny of individuals with criminal records, particularly in the areas of employment and immigration. While we are mindful of security concerns, most parents with criminal records have no connection to terrorist activities. They are, however, especially vulnerable to downturns in the economy and are likely to experience even greater difficulty finding or keeping employment in a recession. We hope that policymakers and legislators will consider the issues raised in this report as they respond to the events of September 11, 2001.

## Chapter One

# Criminal Records and Employment:

## Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families

*Sharon M. Dietrich*

## Introduction

Many people would call Sherry, who has seven children and received welfare benefits for years, a "welfare mother." As part of Pennsylvania's welfare reform plan, though, Sherry attended a job training program to become a certified nursing assistant (CNA). Sherry felt that finishing the course and getting a job as a CNA in a nursing home was the greatest accomplishment of her life. Although she had never finished high school or received a GED, as a CNA she could support her family without receiving cash assistance, even if it meant emptying bedpans and performing other job duties that most people would avoid.

But Sherry was fired after only a short time on the job. Her employer told her that she was terminated because of her 1991 conviction on 1989 drug charges. Sherry was charged because she happened to be in her parents' house when it was raided; her public defender advised her to plead guilty. Even though the nursing home wanted to continue to employ Sherry, it was legally prohibited from doing so under the Pennsylvania Older Adult Protective Services Act. In fact, under this law, Sherry is legally prohibited from working in most facilities in Pennsylvania that employ CNAs. Sherry not only lost time under welfare reform's time limits for training and lifetime receipt of cash assistance, she also suffered a psychological setback because her best efforts were unexpectedly thwarted.[1]

Like most Americans, ex-offenders need paid employment in order to support their families. Ex-offenders who receive cash assistance are subject to the welfare-to-work policies that are the centerpiece of the Temporary Assistance for Needy Families (TANF) program.[2] Moreover, jobs play a major role in defining who we are, and thus participation in the labor economy is central to ex-offenders' identities. In short, employment is a linchpin to the successful rehabilitation of ex-offenders and their full and productive participation in society.

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[1] Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

However, ex-offenders' criminal records typically create an employment barrier for the rest of their lives. In some situations, criminal records result in legal prohibitions against employment in certain occupations or against holding occupational licenses. In professions in which criminal records are not the subject of regulation, employers nevertheless often refuse to hire or retain persons with criminal records. Employers can easily obtain criminal records on job applicants, and ex-offenders go through excruciating job searches in which they are not told that their record is the reason that they are not hired, although they have every reason to believe that is the case.

The options for ex-offenders seeking work are few. They can try to "clean up" their criminal records through sealing, expungements, or pardons, although these procedures are severely limited in most states. They can attempt to enforce underutilized legal remedies that limit the extent to which criminal records can be considered when employment decisions are made. They can try to convince an employer to seek a bond against the risk of theft that the employer fears from employing an ex-offender. Most likely, they do not know of or cannot utilize any of these options, and they see their only alternatives as a long, dogged job search, work in the underground economy, or return to a life of crime.

This section explores the legal frameworks that govern the use of criminal records in the employment context, the realities that ex-offenders encounter when looking for work, and the strategies that ex-offenders may be able to use when looking for work. It concludes with recommendations for policymakers to ameliorate barriers to employment for ex-offenders that are balanced with the risks that hiring them may pose.

## Legal Frameworks Governing Employment of Ex-Offenders

In general, employment law is notable for the absence of governing legal principles. The central principle of employment law is known as "employment at will" — meaning an employer may dismiss an at-will employee at any time for a good reason, a bad reason, or for no reason at all.[3] In practice, this rule has even broader implications, allowing most terms and conditions of the employment relationship (including whether a job applicant will be hired) to be dictated by the employer. "Employment law," then, and the bases for legal action by aggrieved workers, are the many statutory and case law *exceptions* to the principle of employment at will.

Government regulations may, to varying degrees, impose some employment terms on both employers and workers in certain occupations. Sometimes this regulation occurs in the context of occupational licenses from the government that are required for people working in a particular field. Alternatively, federal, state, or local law may directly dictate certain terms of employment, making employers responsible for compliance. When occupations are regulated, the employment of persons with certain kinds of criminal records is often one subject of regulation.

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[2] The Block Grants to States for Temporary Assistance for Needy Families Program (TANF) is codified at 42 U.S.C. §§ 601-1788. It was part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-1983, 110 Stat. 2105. An explicit statutory purpose of the law is "end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a)(2).

[3] *See, e.g.*, Henry Perritt, *Employee Dismissal Law and Practice*, § 1.1, n. 1 (4th ed. 1998).

Depending upon the occupation, ex-offenders face one of two very different legal frameworks. In some jobs, an ex-offender's employment is regulated by law and may be prohibited irrespective of whether or not an employer would be willing to hire that person. More commonly, however, there is no such regulation. In these unregulated jobs, an ex-offender may have some limited legal remedies if denied employment based on a criminal record that is not related to his or her suitability to the job. Often, however, employers are unaware of or uninterested in these legal restrictions on the consideration of criminal records, and they treat the relationship as a standard at-will situation in which they are free to do as they please. They often turn down these job applicants based on concerns about workplace theft or safety, fear of negligent hiring lawsuits, or stereotypical views of ex-offenders.[4]

## Legal Prohibitions on Employment

A few federal statutes prohibit employment of ex-offenders with certain criminal convictions in certain jobs. These include airport security screeners and other airport jobs with direct access to airplanes or secure airport areas,[5] armored car crew members,[6] and any jobs in employee benefit plans.[7]

More commonly, *state* statutes establish restrictions on the employment of ex-offenders in a host of occupations. Many states prohibit the hiring of ex-offenders in jobs that involve the health and safety of children or vulnerable adults, including jobs in long-term care, such as nursing homes[8] and home health care;[9] in child care facilities;[10] and in schools.[11]

In addition to those commonly regulated occupations, most states have other prohibitions on hiring certain ex-offenders.[12] Typically, a state will have a long list of occupations for which employees are required to have licenses and in which criminal convictions must be considered in connection with the award, renewal, or revocation of those licenses. However, in the licensing context, an employee often is permitted to offer proof of rehabilitation that will allow the license to be issued despite the conviction.[13] Finally, in some cases, state law provides that businesses that are required to have licenses to operate will not receive those licenses if they employ persons with certain criminal records.[14]

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[4] A treatise discussing the role of criminal records in employment law notes that some states simultaneously limit use of criminal records in hiring and require checking of criminal records in some occupations. Lex K. Larson, *Employment Screening*, § 9.04[1](1996).

[5] 49 U.S.C. §§ 44935(e)(2)(B) and 44936 (prohibited convictions include weapons convictions and distribution of or intent to distribute a controlled substance).

[6] 15 U.S.C. § 5902 (employment prohibited for convictions that disqualify an employee from qualifying for a firearm license or permit).

[7] 29 U.S.C. § 1111 (13-year disqualification after conviction or end of imprisonment for offenses including robbery, felonies involving controlled substances, and perjury).

[8] *See* Office of Inspector General, U.S. Department of Health and Human Services, *Safeguarding Long-Term Care Residents*, No. A-12-97-00003 (Sept. 1998) (examining diversity of state requirements and implementation of criminal background checks).

[9] *See* U.S. General Accounting Office, *Long-Term Care: Some States Apply Criminal Background Checks to Home Care Workers*, GAO/PEMD-96-5 (Sept. 1996) (finding that 15 states mandated criminal background checks of some home health care workers and usually made a criminal background a basis for adverse action, such as denying employment).

[10] *See* U.S. General Accounting Office, *Child Care: State Efforts to Enforce Safety and Health Requirements*, GAO/HEHS-00-28 (Jan. 2000) (examining state criminal background check requirements in regulated and unregulated contexts).

[11] *See* Larson, *supra* note 4, at § 9.04[1], for other occupations in which criminal record checks are often required.

[12] For instance, a report indicates that New Jersey prohibits employers from hiring some applicants with criminal records for jobs as bartenders, bank employees, civil service housing guards and patrolmen, paid firefighters, firearms dealers and manufacturers, housing authority police, liquor manufacturing or distribution, lottery machine operators, municipal parking enforcement officers, municipal police, turnpike employees, private detectives, public school bus drivers, school crossing guards, racetrack employees, and waiters in establishments with liquor licenses. Judy Capik, *A Criminal Record: A Major Barrier to Getting a Job* 5-6 (Legal Services of New Jersey, April 2000).

[13] In New Jersey, for instance, convictions and proof of rehabilitation are relevant for jobs as alcohol and drug counselors, casino employees, child care staff, domestic violence shelter staff, highway authority workers, housing authority workers, insurance adjustors, non-civil-service municipal jobs (other than police and fire), horse racing licensees, real estate salespersons, real estate appraisers, social workers, and workers in state correctional facilities or facilities for the mentally ill or developmentally disabled. *Id.* at 8-10.

These legal restrictions vary greatly by state and profession, as well as in their scope. An occupation in which employment of ex-offenders is strictly prohibited in one state may be subject to a licensing procedure in which evidence of rehabilitation is considered in another state, and not subject to any regulation at all in a third. Some states may establish a lifetime bar on employment; others may restrict employment for a limited number of years.

An example of the most severe kind of statutory criminal record prohibition is contained in Pennsylvania's Older Adult Protective Services Act (OAPSA).[15] Despite its name, this statute applies broadly to long-term care facilities, defined to include nursing homes, home health care agencies, assisted living facilities, and residential mental health and mental retardation facilities, irrespective of whether they serve older adults.[16] OAPSA's long list of convictions that preclude employment in covered facilities enumerates 35 state crimes and their federal counterparts, including low-level drug crimes, forgery, prostitution, and two theft misdemeanors (including library book theft).[17] All jobs — not only those in which workers have direct contact with care-dependent adults — are included in the prohibition. Even more problematic, a conviction operates as a lifetime bar, and an employee is not permitted to show evidence of rehabilitation. The criminal record provision of OAPSA was enacted by the Pennsylvania legislature in 1996 and 1997.[18] While it "grandfathered" persons with criminal records who had been in their jobs for more than a year prior to July 1, 1998, any worker who was in his or her current job less than a year as of that date or who applied for a job after that date was subject to the restrictions.[19]

The repercussions of OAPSA for Community Legal Services' (CLS) clients were harsh. As soon as the law went into effect, we began to see scores of clients who had been terminated from their jobs and were precluded from finding new ones in the professions for which they were trained and experienced. Eventually, we filed suit alleging that the statute violated Article I, Section 1, of the Pennsylvania Constitution, guaranteeing an individual's right to engage in the common occupations of life. The Pennsylvania Commonwealth Court has ruled that the statute is indeed unconstitutionally overbroad as applied to the five individual and one employer plaintiffs, describing the impact of the law as "draconian" and finding that the challenged provisions are "arbitrary and irrational."[20]

As found by the court, the circumstances of the plaintiffs in our litigation are illustrative of the lack of rational connection between the absolute lifetime bar on persons with criminal records and a realistic threat to care-dependent adults with whom they had been working. A few examples:

∗ Rocky is a 49-year-old legally blind man who had lived in Pittsburgh all his life, until June 2000. In the late 1980s, he participated in employment services offered by the

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[14] In New Jersey, such business licensing requirements apply to auto body repair businesses, gas stations with inspection licenses, diesel emission inspection stations, and organizations operating legalized games of chance — all of which will lose their licenses for employing an individual with *any* criminal record. *Id.* at 11.

[15] 35 P.S. § 10225.503.

[16] 35 P.S. § 10225.103.

[17] 35 P.S. § 10225.503.

[18] Act 169 of 1996 (P.L. 1125, No. 169); Act 13 of 1997 (P.L. 160, No. 13).

[19] 35 P.S. §10225.505.

[20] *Nixon v. Commonwealth of Pennsylvania*, Pa. Commw., 789 A.2d 376 (2001). The decision relies heavily upon the construction of the Pennsylvania Constitution in *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358 (1973). As of the date of this writing, the Commonwealth Court's decision is on appeal to the Pennsylvania Supreme Court as a result of an appeal by the State.

Pennsylvania Office of Vocational Rehabilitation, through which he discovered that he enjoyed working with disabled people. He began a career in April 1990 as a direct care specialist for profoundly retarded and non-ambulatory patients. Over the course of the decade, Rocky steadily advanced in his field, eventually becoming an administrator for an assisted living facility. On February 25, 2000, Rocky left his job over a disagreement with management of his organization. He looked for other jobs in his field, but found that he was barred from employment under OAPSA. In 1971, when he was 19, Rocky had been convicted on marijuana charges. He was sentenced to three years probation and served them without incident. Unable to find work in his chosen field or in the related field of property management, Rocky and his wife were forced to leave their families in Pennsylvania and move to Michigan so that Rocky could take a job paying $13,000 less than his previous position.

- Ted is a 51-year-old husband and father of two who has made a career in the human services field. His past jobs include counseling runaways, performing as a nursing assistant, and tutoring and counseling at-risk youth. In 1974, Ted became addicted to cocaine. He was convicted of possession of drugs in 1975, and arrested on similar charges in 1986, at which time his daughter was placed in foster care. Motivated to reunite his family, Ted successfully completed drug rehabilitation and established steady employment. In 1992, he was able to bring his daughter home. The same year, he started working as a case manager for semi-independent, mentally ill patients, assisting clients who had left residential facilities to become and remain as independent as possible. Because he obtained that job before OAPSA's effective date, he is legally permitted to keep it — but he is now essentially unable to leave it. He cannot seek higher paid employment, and if his program were forced to lay him off, he would not be able to acquire another job in his field. Also, he is precluded from obtaining additional part-time employment in his field, which he would like to do to supplement his $24,500 salary and save for his children's college educations.

These stories illustrate the dangers of categorical employment prohibitions for people with criminal records. Rocky's and Ted's transgressions occurred decades ago, and both have histories of working successfully and commendably in their chosen professions. They have now been penalized, long after their criminal sentences were served, without any opportunity to show their fitness to work in their occupations. As Rocky's case shows, such a law can preclude a person from an entire profession in which he is trained and experienced. Moreover, in the human services field, where pay is low and workers often in short supply, prohibiting employers from hiring qualified workers can in fact compromise care to the vulnerable persons whose safety this legislation was designed to protect.[21]

A policy similar to OAPSA has not survived a constitutional challenge in Massachusetts. Procedure No. 001, a rule issued by the state's Executive Office of Health and Human Services (EOHHS), provided that persons who had been convicted of certain crimes of violence, sexual assault, and drug trafficking were subject to mandatory lifetime disqualifications for jobs or volunteer opportunities with any state agency within EOHHS or with human service providers funded by EOHHS. Characterizing the consequences to the plaintiffs as a "lifetime mandatory debarment" similar to debarments of government contractors, the court concluded that plaintiffs had a liberty interest in the loss of employment opportunities.[22]

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[21] Believing that its ability to adequately fill its jobs has been undermined by OAPSA, Resources for Human Development (RHD), a nonprofit social service organization providing programs for persons with mental illness, mental retardation, and chemical dependency, is participating in our lawsuit as a plaintiff. RHD operates 125 programs, in Pennsylvania and other states, employs around 2,300 workers, and serves approximately 12,000 individuals per year.

The Massachusetts court concluded that "procedural due process under Article 12 of the Massachusetts Declaration of Rights must also forbid, in all but the most limited circumstances, a mandatory conclusive lifetime presumption that a person convicted of certain crimes poses an 'unacceptable risk' to persons receiving social services."[23] It noted that this holding did not mean that a job applicant could never be rejected based on a criminal conviction, but that the applicant must have a fair opportunity to rebut the inference that he or she poses an unacceptable risk to recipients of human services.[24]

The holdings of the Pennsylvania and Massachusetts courts are important steps toward recognizing that lifetime blanket bans on employment of ex-offenders lack the fundamental fairness required by constitutional due process law. Overbroad government bans on employment of ex-offenders can be expected to be challenged under this theory in the future.[25]

## Consideration of Criminal Records in Employment-at-Will Settings

Jobs in which employers are prohibited by law from hiring people with criminal records are the exception, not the rule. In a typical employment-at-will situation, employers make hiring decisions based on their own judgment. When considering job applicants who have criminal records, or any involvement in the criminal justice system, employers often choose not to hire them. For instance:

> Fatima is a mother of one who receives Social Security Disability Insurance, but would rather work. Fatima was hired for a job as a paratransit driver in November 1998 but was dismissed after a week's training because her criminal record check revealed that she had been arrested on drug charges in February 1995. On the day in question, Fatima's brother had been caring for her son in her home while she attended GED classes. Shortly after Fatima returned home, the Philadelphia police raided her house. Her brother had brought marijuana into the home, and Fatima, who had just received a marked $20 bill from her brother in payment of a debt, was arrested along with her brother. She pled not guilty, and the charges against her were dismissed in August 1995 for lack of evidence. She has no criminal convictions. Her supervisor fired her despite her explanations, saying that she must have done something that warranted the 1995 arrest.

Fatima lost a job for an arrest that did not lead to conviction. Generally, people with convictions face even more severe problems finding and keeping employment.[26] Job searches may be long and frustrating.[27] In desperation, many lie about their criminal records. They then may lose their jobs after several weeks when their employer receives their criminal record transcripts; typically, they will not receive unemployment insurance benefits in this situation. In some cases, the criminal record that comes back to haunt a person is decades old, the person long since rehabilitated.[28]

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[22] *Cronin v. O'Leary*, No 00-1713-F, slip op. at 6-9 (Mass. Super. Ct. Aug. 9, 2001), www.socialaw.com/superior/00-1713-F.html. In its liberty interest holding, the court relied heavily on the "seminal" case of *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 964-66 (D.C. Cir. 1980). *Id.* at 9.

[23] *Id.* at 13-14.

[24] *Id.* at 15.

[25] The Commonwealth of Massachusetts decided not to appeal the trial court decision in *Cronin*.

[26] Even the tight labor market of the late 1990s did not create many employment opportunities for ex-offenders. Ex-offenders may have been hired at higher rates than ever before, and some success stories were publicized. Mark Tatge, *Prison Labor: With Unemployment Low, a New Group Is in Demand: Ex-Cons*, Wall St. Journal, April 24, 2000, at A1. However, the minority of recent ex-offenders who found work often found only menial jobs at low wages. Peter T. Kilborn, *Flood of Ex-Convicts Finds Job Market Tight*, N.Y. Times, March 15, 2001.

[27] One ex-offender, with skills as a plumber, electrician, and carpenter, wrote an editorial describing his job search of several months, during which his job interviews often effectively ended when he was asked about his criminal record for crimes he committed eleven years earlier. Eugene Murriell, *Ex-Con's Free, But Locked Out of a Job*, Phila. Daily News, Sept. 12, 2000, at 18. *See also* Maida Odom, *Ex-Prisoners Face Powerful Bars When Trying to Land a Decent Job*, Phila. Inquirer, Dec. 19, 1995, at C1.

Never has it been easier for a prospective employer to find out whether a job applicant has a criminal record. Criminal records often can be obtained directly from the government, requiring only a name, social security number, and date of birth — not necessarily the permission of the person in question.[29] Some states make criminal record information directly available on-line.[30] Alternatively, an employer (or other curious person) can find a criminal record through an Internet screening service. A recent inquiry using the Yahoo search engine revealed twenty-five such services.[31] Given the ease with which a criminal record can be located, chances that an ex-offender's record will be considered in an employment decision have increased greatly.

In the past, the Fair Credit Reporting Act prohibited the reporting of "obsolete" convictions more than seven years old.[32] However, as a result of 1998 legislative amendments, this provision was deleted, allowing convictions to remain on credit reports in perpetuity.[33]

Although many employers assume that they have unfettered rights to reject job candidates based on their criminal records, there are in fact some legal limitations on the consideration of criminal records. First, some states have enacted laws that restrict the use of criminal history records in employment decisions.[34] For instance, Pennsylvania has a statute providing that, "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."[35] These laws appear to be enforced only rarely, however.[36]

Second, for African-American and Hispanic ex-offenders, employment rejection based on a criminal record may implicate a race discrimination claim under Title VII of the Civil Rights Act of 1964 (Title VII).[37] This claim is based on a "disparate impact" theory, recognizing that even unintentional discrimination violates the law where a facially neutral policy disparately harms minority job seekers and is not required by business necessity.[38] In the criminal record context, this claim would be that, because African-Americans and Hispanics are arrested and convicted in numbers disproportionate to whites, a policy of blanket rejections of job applicants based on their criminal records disproportionately disadvantages minorities.[39]

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[28] In a column in a national news magazine, a chemical dependency interventionist and workplace management consultant asked, "For 30 years I've lived a good life — so why should I have to tell a potential employer about my past?" *Walter Scanlon, It's Time I Shed My Ex-Convict Status*, Newsweek, Feb. 21, 2000, at 10.

[29] For instance, Pennsylvania's request for criminal record form can be found on-line at http://sites.state.pa.us/PA_Exec/State_Police/pdf/sp4-164.pdf.

[30] D. Ian Hopper, *Online Lists of Felons Are Raising Questions*, Phila. Inquirer, Dec. 29, 2000.

[31] The search was conducted on February 14, 2001, using the parameters "employment and criminal records." A typical website accessed through this search was that of Interquest Information Services (www.interqst.com), which promised background checks by fax or on-line (including "a paperless environment in which to exchange information") for $16.00, in 24 to 72 hours.

[32] 15 U.S.C. § 1681c(a)(5) (repealed).

[33] Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, § 5(2).

[34] Often, these laws are part of a state's antidiscrimination law. *See, e.g.*, Cal. Code Regs. Tit. 2, Division 4, § 7287.4(d)(1); Conn. Gen. Stat. § 46a-80; Fla. Stat. Ann. § 112.011 (public employment); Haw. Rev. Stat. § 378-2.5; Mass. Gen. Law Ann. ch. 151B, § 4(9); Mich. Comp. Laws § 37.2205a; N.Y. Executive Law § 296; Or. Rev. Stat. § 659.030(1) (juvenile records only); Wis. Stat. § 111.335. *See also* Larson, *supra* note 4, at 9.04[1]; Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 Clearinghouse Rev. 597, 600 n. 20 (Jan.-Feb. 2000) (hereinafter "Mukamal").

[35] 18 Pa. Cons. Stat. Ann. § 9125(b).

[36] For instance, there is only one reported court decision under the Pennsylvania statute, which was enacted in 1979. *Cisco v. United Parcel Service*, 476 A.2d 1340 (Pa. Super. 1984). A plausible reason for the lack of enforcement is that, unlike most employment statutes, this law does not provide for attorneys' fees to a prevailing plaintiff.

[37] 42 U.S.C. §§ 2000e - 2000e-17.

[38] Title VII disparate impact claims are codified at 42 U.S.C. §2000e-2(k). *See also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Court decisions on this subject are synthesized in a 1987 Equal Employment Opportunity Commission (EEOC) policy statement on employer use of criminal convictions records.[40] This guidance sets forth EEOC's position: because a policy or practice of excluding persons from employment on the basis of their conviction records has an adverse impact on African-Americans and Hispanics, such a policy violates Title VII unless the employer demonstrates a business necessity for the policy. The policy statement identified three factors relevant to the business necessity justification:

(1) The nature of the gravity of the offense or offenses;

(2) The time that has passed since the conviction and/or the completion of the sentence; and

(3) The nature of the job held or sought.[41]

In 1990, EEOC issued a policy statement on arrest records, reaffirming its 1987 guidances on convictions and concluding that employers will seldom be justified in making employment decisions based on arrests that did not lead to convictions.[42] EEOC also added a fourth criterion for evaluating arrests to the three listed above for evaluating convictions: the employer must evaluate the likelihood that the applicant engaged in the conduct for which he or she was arrested. Under the detailed analysis set forth by the EEOC in its 1990 policy statement, a blanket exclusion from employment of persons with arrest records will rarely be justified, as the criteria require individual assessment of the applicant's situation.

Despite this solid foundation for Title VII claims based on criminal history records, few such claims have been brought in the past decade, and these often have been rejected.[43] These results may in many cases be explained by their use of the U.S. Supreme Court's restrictive 1989 disparate impact analysis. However, the Supreme Court's ruling was overruled by Congressional statute in 1991,[44] and such litigation should now face better prospects. The bottom line is this: while Title VII claims based on criminal records should continue to have vitality, given the current state of disparate impact law, these cases have been brought so seldom that they have had little impact on the employment law landscape. Few employers, and even fewer would-be employees, have any idea that these legal principles exist.

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[39] Legal support for criminal record disparate impact claims dates to the early 1970s, when the courts and the Equal Employment Opportunity Commission (EEOC), which is responsible for enforcement of Title VII, began to find Title VII violations where there was either a blanket exclusion of persons with criminal records or a lack of business necessity for such a policy. In 1970, a federal district court found that a policy that automatically disqualified persons who had arrest records violated Title VII. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). *Gregory* is still considered the leading case on an employer's use of arrest records.

Several years later, a federal appeals court rendered the most important decision on convictions, ruling that an across-the-board disqualification based on convictions was invalid. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). Several more rulings finding a Title VII violation for employer use of criminal records followed, *e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (brought under 42 U.S.C. §§ 1981 and 1983); *Dozier v. Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975); *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); EEOC Decision No. 74-89 (Feb. 12, 1974); EEOC Decision No. 71-2682 (June 28, 1971).

[40] *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* (1982) (Feb. 4, 1987), in II EEOC Compliance Manual § 604.

[41] A subsequent policy issued by EEOC in 1987 discussed the plaintiff's burden of proving a disparate impact in a criminal conviction charge, indicating that EEOC would apply a presumption of an adverse impact on African-Americans and Hispanics, based on national and regional conviction rates statistics. *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987), in II EEOC Compliance Manual App. 604-B.

[42] *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)* (Sept. 7, 1990), in II EEOC Compliance Manual § 604.

[43] See, *e.g., Matthews v. Runyon*, 860 F. Supp. 1347 (E.D. Wis. 1994) (summary judgment against plaintiff for failing to establish a prima facie case); *Lewis v. Alabama Dept. of Public Safety*, 831 F. Supp. 824 (M.D. Ala. 1993) (dismissal on plaintiff's inadequate statistical showing); *Williams v. Carson Pirie Scott*, No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643 (N.D. Ill. Sept. 9, 1992) (finding that defendant established business necessity to fire employee from "collector" position); *Equal Employment Opportunity Commission v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989) (both rejecting plaintiff's prima facie case and finding business necessity); *Moses v. Browning-Ferris Industries of Kansas City*, No. 84-2334-S (D. Kan. Sept. 22, 1986) (finding for defendant after trial on grounds that the policy of rejecting applicants for position of garbage collector who were convicted of crimes involving moral turpitude was justified by business necessity).

In contrast to their lack of knowledge of Title VII claims, employers are extremely well aware of another type of litigation: negligent hiring cases. In these lawsuits, employers are sued for hiring persons with criminal records who commit acts of violence in their jobs.[45] When this litigation risk is added to employer bias and stigma against ex-offenders,[46] it is no wonder that ex-offenders (or even people like Fatima who are arrested but not convicted) face daunting prospects in the job market.

## Strategies for Ex-Offenders Seeking Employment

There are options for ex-offenders who need jobs, although they hardly guarantee easy success. Moreover, many or most ex-offenders are unaware of these possibilities. Following is a list of strategies that ex-offenders should consider to maximize their opportunities for employment.

### 1. "Clean up" criminal records.

Eradicating arrests or convictions or sealing the criminal records so that they are not available to the public is the best outcome for an ex-offender seeking work. However, in most cases there is little opportunity to do so. Grounds for sealing or expungement vary by state; typically, however, they are quite narrow.[47] Pardons, though often sought by hampered job seekers, tend to be discretionary and rare.[48] New York has addressed the issue of the stigma of criminal records not by eliminating or sealing the record, but rather by awarding certificates of rehabilitation to ex-offenders who have avoided any further offenses for a given length of time, although the effectiveness of these certificates is unclear.[49]

A person with a criminal record can and should take steps to ensure that it is correct because errors are common.[50] One study of New York records found one error in a full 87 percent of the records examined, and two or more errors in 41 percent.[51] Sometimes, a person has been the victim of identity fraud, resulting in a criminal record for charges in which he or she was not involved, and this can be proved by submitting to fingerprinting.

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[44] In *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), the Supreme Court drastically modified the method of proof required from a plaintiff in a disparate impact case. However, that decision has since been replaced by the more flexible standards of Section 105 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which was enacted to return the disparate impact analysis, in most respects, to pre-*Wards Cove* law. *See* 42 U.S.C. § 2000e-2(k). The 1991 law did not have retroactive effect, e.g., *Davey v. City of Omaha*, 107 F.3d 587, 591-93 (8th Cir. 1997), and even some cases decided after 1991 employed the *Wards Cove* standards.

[45] *See* Mukamal, *supra* note 34, at 601-02; William C. Smith, *Victims of Omission*, ABA Journal 32-33 (March 1999); Ferdinand S. Tinio, *Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct*, 49 A.L.R.3d 359 (1973).

[46] *See* Mukamal, *supra* note 34, at 598-599, 603 and n. 42.

[47] *Id.* at 602. In Pennsylvania, for example, the only bases for expungement of ordinary convictions are when the person reaches age 70 and has been free from arrest or prosecution for 10 years, or when the person has been dead for three years! 18 Pa. Cons. Stat. Ann. § 9122(b). Expungement of arrests not leading to convictions is more plausible. *See* 18 Pa. Cons. Stat. Ann. § 9122(a)(1).

[48] *See* Russell E. Eshelman Jr., *Pardon Me, Say Contrite Job Seekers*, Phila. Inquirer, Feb. 18, 1996, at B1.

[49] *See* Mukamal, *supra* note 34, at 604 (citing N.Y. Correct. Law §§ 700-6 (McKinney 1999)).

[50] *See* Mukamal, *supra* note 34, at 603.

[51] Legal Action Center, *Study of Rap Sheet Accuracy and Recommendations to Improve Criminal Justice Recordkeeping* 3 (1995). Deborah Mukamal of the Legal Action Center advises that the accuracy of New York's rap sheets has improved somewhat since the study.

## 2. Provide employer incentives through bonding and tax credit programs.

The U.S. Department of Labor provides a federal bonding program, administered by states that choose to participate in it, through which an employer can be insured against employee theft by at-risk job applicants, including ex-offenders.[52] The persons covered by this program are not otherwise bondable under commercially-purchased fidelity bonds, which exclude from coverage those employees who have committed prior fraudulent or dishonest acts. The federal bonding program provides $5,000 coverage for six months at no cost to the employer and with no deductible, for an otherwise not-bondable employee. If the federally-bonded employee does not commit acts of dishonesty within the six-month period, the employer can purchase continued bonding coverage. However, the federal bonding program insures only against stealing by theft, forgery, larceny, or embezzlement; it does not cover other sorts of liability.

Bonds can be issued within a day of a job applicant or employer's contacting a one-stop career center or job service center.[53] No paperwork is required of the applicant or employer. The only requirements are that the employer has made the applicant a job offer and set a date for the person to start work.

Bonding appears to be a potentially powerful strategy to assist ex-offenders in obtaining employment. In a study of employer attitudes about hiring ex-offenders, although only 12 percent of employers said that they were willing to hire ex-offenders, 51 percent indicated that they would do so if the individuals were bonded. According to the organization that manages the federal bonding program, approximately 40,000 applicants have obtained jobs because they were bonded, and 99 percent of these have turned out to be honest workers.[54]

Additionally, the federal government provides a tax credit for employers who hire certain ex-offenders. Under the Work Opportunity Tax Credit Program, an employer can receive the tax credit if they hire an ex-offender who:

- has been convicted of a felony;
- is hired within a year after conviction or release from prison; and
- is a member of a low-income family.[55]

The tax credit is 40 percent of the first $6,000 of wages, for a maximum credit of $2,400.[56] The new hire must be employed at least 180 days or 400 hours. A partial credit of 25 percent is available for employees working between 120 and 400 hours.

Despite their promise, these incentives to hire ex-offenders are under-publicized and underused, by both ex-offenders and employers. In our experience, they are virtually unknown except to the state employment service staff who administer them.[57]

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[52] In addition to ex-offenders, the program provides bonding coverage to ex-addicts, persons with poor credit histories, poor people without work histories, and persons dishonorably discharged from the military.

[53] *See* Amy Lindgren, *Bonding Program Eases the Way to Employment*, Phila. Inquirer, Dec. 13, 1999, at E6.

[54] This information was provided by the McLaughlin Co. manager of the federal bonding program for Travelers Property Casualty Insurance Co., which provides the insurance policies. Information about the federal bonding program can be obtained from a state job service or one-stop career center, or from the McLaughlin Co., 1725 DeSales St., N.W., Washington, DC, 20036; phone: (202) 293-5566; fax: (202) 857-8355.

[55] *See* Internal Revenue Service Form 8850 and instructions thereto.

[56] The amount of the WOTC does not compare favorably to the Welfare-to-Work Tax Credit, which can be as much as $8,500 per new hire.

[57] For instance, although Greater Philadelphia Works (GPW) was one of the best performing welfare-to-work programs in the country, it was Community Legal Services, Inc., who informed the program about the bonding and tax credit opportunities. GPW then incorporated these tools in their employment strategies for hard-to-place welfare recipients.

### 3. Enforce legal remedies against rejection based on criminal record.

As discussed above, ex-offenders may have legal grounds on which to challenge some employment decisions. However, several obstacles tend to prevent enforcement of these legal rights. First, most ex-offenders do not know about them. Further, they may not able to prove that the reason they were not hired was because of their criminal record, despite their strong suspicions. Attorney assistance usually is not readily available to them, and, if it were, their attorneys also may not be aware of these legal principles. EEOC, the agency that enforces Title VII, rarely sees these claims, and their intake staff may fail to recognize their jurisdiction over these cases and therefore turn them away. Accordingly, only a few ex-offenders will find success through this route.

### 4. Seek services from an employment program for ex-offenders.

For a period starting in the 1970s, research indicating that "nothing works" in prisoner rehabilitation led to a paradigm shift in criminal justice away from rehabilitation and toward "get tough" strategies — and thus to a decline in ex-offender employment programs.[58] More recent research has shown that employment programs for ex-offenders can increase employment and earnings and reduce recidivism.[59] Also, a confluence of events in the 1990s, including the tight labor market and resources made available as a result of welfare reform, brought about a resurgence in employment programs focused on ex-offenders.[60] These programs typically provide job readiness courses, job assessment and development, and post-placement activities — services responsive to the overriding need of people recently released from incarceration to find jobs quickly.[61] While these programs are a welcome addition to the options available to ex-offenders, they are small in both number and scope, and they focus primarily on persons recently incarcerated, even though ex-offenders with old records also face employment difficulties.[62]

### 5. Engage in a dogged search for employment.

This is the only option known and available to most ex-offenders. If they are eventually successful, they may still be under-employed or tenuously employed.[63] If not successful, their return to a life of crime is a distinct possibility.

## Policy Recommendations for Improving the Employment Prospects of Ex-Offenders

Clearly, there is a pressing need for reforms to improve employment possibilities for ex-offenders, without undermining legitimate employer and societal concerns about security risks that ex-offenders might present. These reforms should be geared primarily toward avoiding overbroad laws that prohibit the employment of ex-offenders, improving existing options to assist ex-offenders in finding employment, providing public education around existing options, and allowing ex-offenders

[58] Maria L. Buck, *Getting Back to Work: Employment Programs for Ex-Offenders* 2-3 (Public/Private Ventures, Fall 2000).

[59] Legal Action Center, *Getting to Work: How TANF Can Support Ex-Offender Parents in the Transition to Self-Sufficiency* 10-11 (April 2001); Buck, *supra*, at 3-6.

[60] Buck, *supra* note 58, at 1.

[61] *Id.* at 11.

[62] Several of the notable local programs that do exist are described in Buck, *supra* note 58, at 27-33, and Legal Action Center, *supra* note 59, at 21-23. *See also* Rebecca Brown, *Helping Low-Income Mothers with Criminal Records Achieve Self-Sufficiency* 6-7 (Welfare Information Network Issue Notes, Dec. 2000).

[63] A recent study of ex-offenders' employment found that ex-offenders are more likely than other low-wage workers to be unemployed or under-employed and to have very low income potential. Jared Bernstein and Ellen Houston, *Crime and Work: What We Can Learn from the Low-Wage Labor Market* (Economic Policy Institute, 2000).

who have paid their dues to have their records cleared.

## 1. Avoid overbroad, blanket employment prohibitions on ex-offenders.

The legislative trend of requiring background checks and prohibiting the employment of ex-offenders may insure political popularity, but it is not sound public policy. Ex-offenders are excluded from entire professions, including those in which they may be trained and experienced, without serious thought to the consequences.

Employment prohibitions that are well tailored to protect a vulnerable population, such as children or the mentally impaired, are one thing. But even for those populations, there should be limits that avoid the needless exclusion of rehabilitated ex-offenders. Time limits on disqualification should be established for less serious infractions; lifetime disqualifications should only be rendered for the most serious crimes, if at all. Administrative forums, such as licensing boards, also should be created for persons who otherwise would be disqualified. These venues would allow ex-offenders to show that they are good risks for employment through presentation and consideration of the circumstances of the crime, the severity of the sentence, and the rehabilitation of the person.

## 2. Publicize and enforce existing laws limiting employer consideration of criminal records and enact new laws.

The potential remedies against employer consideration of criminal records have had little effect, given that they are little-known by ex-offenders and employers and seldom enforced. For years, the EEOC has neglected this form of racial discrimination; now, it must provide leadership to ensure that it is eradicated. EEOC should:

- Update its policy statements on criminal record claims to incorporate the developments of the last fifteen to twenty years, most significantly, the Civil Rights Act of 1991.
- Train its staff about these claims, which are not routine discrimination charges, so that they will be handled appropriately in the intake and investigation processes.
- Educate ex-offenders about their rights and employers about the illegality and consequences of improperly rejecting job applicants with criminal records. Probation officers, job training programs for ex-offenders, welfare-to-work programs, and others who try to place ex-offenders in jobs also should also be informed about these laws.
- Enforce the law by litigating in appropriate cases.[64]

Even with these changes, however, Title VII and other antidiscrimination laws would not solve the problems of ex-offender employment. An obvious pitfall to these disparate-impact racial discrimination claims is that they apply only to African-American and Hispanic ex-offenders. The principles underlying the "business necessity" prong of the discrimination analysis — that criminal records should only be considered to the extent relevant to the job for which an ex-offender has applied — should be codified into color-blind laws, such as those that currently exist in some states. The seriousness of the ex-offender's crime, the length of time that has passed since the last infraction, and the extent of the person's rehabilitation all should be requirements for employer evaluation.

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[64] These recommendations were first published in Sharon Dietrich *et al.*, *Work Reform: The Other Side of Welfare Reform*, 9 Stan. L. Pol'y Rev. 53, 56-57 (Winter 1998).

### 3. Improve the bonding and tax credit programs.

While the federal bonding program holds significant promise for encouraging employers to take reasonable chances on ex-offenders, its effectiveness could easily be improved through the following changes:

- Increase the amount of the protection beyond $5,000.
- Provide protection for harms in addition to theft, such as against negligent hiring, personal injury, or workers' compensation claims that could arise from crimes of violence.
- Increase the time period for coverage beyond six months.
- Return the administration of the program to the U.S. Department of Labor, so that ex-offenders are not dependent on their state's agreement to participate in the program.

Similarly, the Work Opportunities Tax Credit program should be improved to enhance its value as an incentive to hire ex-offenders. Most notably, the requirement that an ex-offender be hired within a year after conviction or incarceration should be loosened. An increase in the amount of the credit — at least to the level of the Welfare-to-Work Tax Credit — also would help its effectiveness.

As important as program design is program publicity. Given how little known the federal bonding program and Work Opportunities Tax Credit are, their limited effect is understandable.

### 4. Increase resources for employment programs for ex-offenders.

Existing employment programs for ex-offenders only begin to address the need. Resources for such programs should be increased. Moreover, they should offer job training along with employment search and retention assistance, given the educational and skill barriers common among ex-offenders.[65] Under many circumstances, TANF funds can be used to provide services to both custodial and non-custodial parents, including providing training, work-related services, and drug and alcohol treatment during incarceration.[66] This flexibility must be maintained in the TANF block grants when Congress reauthorizes that program.

### 5. Provide rehabilitated ex-offenders with opportunities to escape from their criminal records.

As discussed above, a criminal record is currently among the most insidious features of a person's "permanent record." A thirty-year-old record, even for a minor crime, can continue to haunt the employment prospects of a person who has long since turned his or her life around, undermining the entire notion of rehabilitation.

States could reduce the harsh effects of criminal records on ex-offenders who have paid their dues by revising their treatment of criminal records. For instance, states could:

- Expunge offenses after a person has demonstrated freedom from recidivism over a length of time.
- Seal records after a period of rehabilitation.
- Offer certificates of rehabilitation.
- Examine whether pardon standards and procedures adequately address the employment needs of ex-offenders.

In addition, federal or state law could restore ex-offenders' privacy by tightening criteria for release of criminal records. Records should not be available upon demand, without the ex-offender's consent. The recent legislative changes to the Fair Credit Reporting Act, eliminating the seven-year period after which a conviction is considered obsolete, should be repealed.

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[65] See Buck, *supra* note 58, for more comprehensive recommendations on the future of employment programs for ex-offenders.

[66] Legal Action Center, *supra* note 59, at 14, 17-18.

## 6. Strengthen employment conditions in the low-wage labor economy.

In a recent study, the Economic Policy Institute (EPI) made the case that conditions in the labor economy, especially the low-wage labor economy in which many ex-offenders are likely to find employment, have an important relationship to crime rates.[67] EPI points to a full-employment economy, the minimum wage, education and training, and work supports, such as the Earned Income Tax Credit, as important parts of an anti-crime agenda.[68] In other words, policy initiatives that improve the overall plight of low-wage workers will not only prevent initial offenses, but will also help ex-offenders.

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[67] See Bernstein & Houston, *supra* note 63.

[68] *Id.* at 25-29.

## Chapter Two

# Parents with Criminal Records and Public Benefits:

## "Welfare Helps Us Stay in Touch with Society"[1]

*Amy E. Hirsch*

## Introduction

Parents who are reentering the community after incarceration often need public benefits in order to reunify their families, pay rent, and buy food, clothing, and other necessities. Some parents with criminal records have disabilities that prevent them from working. Others can work but need assistance until they are able to find a job (which may take considerably longer than for an individual without a criminal record, as discussed elsewhere in this report). Without some income, parents are unable even to look for work — finding a job requires funds for transportation, telephone calls, newspapers or other want ads, suitable clothes, and child care during the search and application process.[2]

Without sufficient income to secure acceptable housing, parents who are released from prison will not be able to bring their children home to live with them. Although welfare programs provide very low benefits ($379 is the median monthly Temporary Assistance for Needy Families [TANF] benefit for a family of three with no other income[3] and Food Stamps provide only 81 cents, on average, per person per meal),[4] access to these programs can make the difference between subsistence and total desperation.

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[1] Quotation from Tanya in Amy Hirsch, *"Some Days Are Harder Than Hard:" Welfare Reform and Women With Drug Convictions in Pennsylvania* 66 (Center for Law and Social Policy, 1999), www.clasp.org/pubs/TANFSTATE/SomeDays.htm (hereinafter "Hirsch"). Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

[2] Welfare programs also are often the gateway to employment and training services.

[3] U.S. Department of Health and Human Services, Administration for Children and Families, *Temporary Assistance for Needy Families (TANF) Program: Third Annual Report to Congress* 244 (Aug. 2000). TANF is the block grant that replaced Aid to Families with Dependent Children (AFDC), the program most people think of as "welfare."

[4] U.S. Department of Agriculture, Food and Nutrition Service, *Food Stamp Program: Average Monthly Benefit Per Person (Data as of June 27, 2001)*, www.fns.usda.gov/pd/fsavgben.htm.

This chapter discusses some of the serious barriers that parents with criminal records face in accessing the public benefits that they need to rebuild their families and move forward with their lives.

- The federal "welfare reform" law[5] imposed a lifetime ban on TANF and Food Stamps for people with felony drug convictions for conduct after August 22, 1996 — regardless of their circumstances or subsequent efforts at rehabilitation — unless their state affirmatively passes legislation to opt out of the ban.[6]
- Parents with certain kinds of ongoing problems with the criminal justice system (outstanding felony bench warrants, or in violation of probation or parole) are ineligible for Food Stamps,[7] SSI,[8] or TANF[9] until those problems are resolved.
- Parents with criminal records may have particular difficulties complying with TANF and Food Stamp work requirements.
- Caseworker confusion and stringent "verification" requirements[10] result in parents wrongly being denied benefits because of their criminal records.

If they are eligible for benefits, parents with criminal records also face welfare department requirements concerning work, child support enforcement, and verification, which may directly conflict with the court-ordered probation or parole conditions or with other demands of the criminal justice or child welfare systems. As a result, parents may be forced to choose between doing what is required to get or keep welfare benefits and doing what is required to recover from alcoholism or drug dependence, retain or regain custody of their children, or stay out of jail. In a vicious cycle, losing public benefits is likely to make it harder for parents with criminal records to stay clean and sober, avoid abusive relationships, take care of their children, and resist engaging in criminal activity. For example, a study of women on the street in New York found that access to public benefits was important in enabling women to leave prostitution.[11]

Public benefits also provide a connection to civil society: "For women with drug convictions, who are stigmatized as drug addicts, as criminals, as unfit mothers, becoming welfare recipients would mean a step up the social ladder, a return to normal life."[12] As one woman with a felony drug conviction explained:

> We still need welfare until we are strong enough to get on our feet. Trying to stay clean, trying to be responsible parents and take care of our families. We need welfare right now. If we lose it we might be back out there selling drugs. We trying to change our lives. Trying to stop doing wrong things. Some of us need help.

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[5] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, as amended by the Balanced Budget Act of 1997, P.L. 105-33.

[6] 21 U.S.C. § 862a.

[7] Section 821 of PRWORA, codified at 7 U.S.C. § 2015(k). *See* David A. Super, *Food Stamps and the Criminal Justice System* (March 6, 2001) for a more detailed discussion of interactions between the Food Stamp Program and the criminal justice system.

[8] Section 202 of PRWORA, codified at 42 U.S.C. § 1382(e)(4).

[9] Section 103 of PRWORA, codified at 42 U.S.C. § 608(a)(9). *See* Mark Greenberg, *TANF and Criminal Convictions* (Center for Law and Social Policy, July 1999), www.clasp.org/pubs/TANF/tanfandcrimes.htm for an outline of the possible impact of criminal convictions on the receipt of TANF-funded benefits or services.

[10] Verification is the welfare term for proof that an applicant or recipient is giving truthful information to the welfare department. On a wide range of issues (including income, family composition, and residence), the individual's statement is often considered insufficient without written "verification" by a third party.

[11] Nabile El-Bassel *et al.*, *Sex-Trading and Psychological Distress among Women Recruited from the Streets of Harlem*, 87 Am J. Public Health 66 (1997).

[12] Amy Hirsch, *Bringing Back Shame: Women, Welfare Reform, and Criminal Justice*, Temple Political & Civil Rights Law Review (forthcoming 2002).

> Welfare helps us stay in touch with society. Trying to do what's right for us.[13]

Although welfare receipt carries tremendous stigma, being barred from receiving benefits is even more shameful. For women who have been living on the streets, welfare is a symbol of their return to society. For women who have been financially dependent on abusive boyfriends or husbands, welfare is essential to escaping abuse. Until a woman is able to work, welfare is often the only legal way she can have money of her own and be independent.[14] Telling women that they can never get assistance, no matter what they do or how hard they try, simply pushes them back into abusive relationships and active addiction.

## Parents With Felony Drug Convictions: Banned From TANF and Food Stamps For Life

Federal law provides that, unless they reside in a state that affirmatively passes legislation to opt out of the ban, individuals with felony drug convictions for conduct after August 22, 1996, are barred for life from TANF and Food Stamps. This lifetime exclusion has a devastating effect on ex-offender parents, particularly mothers.

As a result of the other requirements for TANF benefits,[15] approximately 90 percent of the adults on TANF are women. Approximately 60,000 women are convicted of felony drug offenses each year in the United States. Although we don't know how many of these women have children, we do know that 65 percent of adult women in state prisons have minor children.[16] Estimating the number of parents affected is further complicated by state variations. While at least 30 states and the District of Columbia have passed legislation to eliminate or modify the ban, some states that have not opted out of the federal ban, as well as some states with a modified ban, have extended the ban to their General Assistance programs as well. A list of states that have eliminated or modified the ban is attached as Appendix A to this chapter.

The ban makes it very difficult for women to complete drug treatment. Tracey testified in support of a bill that would lift the ban in her state:

> I'm twenty-one years old. I have a daughter who will be four later this month. The whole time I was growing up, we never lived stable. My mom is also an addict, and life was very hard. My older sister always had friends she could stay with, and who helped her out. I never did, so I stayed home and tried to take care of my little brother. My mom was always getting beaten up by her boyfriends. The whole twenty-one years of my life my mom was always in abusive relationships. It was all I knew.
>
> I met my daughter's father when I was eleven. I got my first black eyes — two black eyes — from my daughter's father when I was fourteen. I locked myself in the basement because I was so embarrassed about how I looked, all bruised. I started using drugs around then, to stop thinking about everything that was bad in my life.
>
> I stopped going to school after 8th grade. I didn't want to go to school because I didn't have nice clothes. I was taking care of my younger brother, and no one pushed me to go

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[13] Quotation from Tanya in Hirsch, *supra* note 1, at 66.

[14] Individuals who are banned from TANF assistance also lose access to a wide range of employment-related services provided by states through their TANF assistance programs.

[15] Recipients of TANF assistance must be either pregnant or raising minor children. In addition, the eligibility criteria make it very difficult for two-parent families to get benefits in many states.

[16] Christopher J. Mumola, *Special Report: Incarcerated Parents and Their Children* 1 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2000) (hereinafter "Mumola").

to school, or cared that I didn't go. I was with my daughter's father a lot, and we would drink and get high and fight, and then I would have more black eyes and more bruises. We got arrested together on drug charges in 1999, when I was 19.

Before I was arrested, no one ever offered me drug treatment, or help with getting beaten up. In jail, I was in the OPTIONS drug and alcohol treatment program. I was in jail for about a year before being released to Interim House.

I came to Interim House straight from jail. I don't have anyone who can help me, my mom is still in her addiction, so I have to ask the program for help for everything I need. I have no way to get money for shampoo, or soap, or personal products other than to ask the program. It's embarrassing, to have to ask for everything. We take turns cooking, and we have house meetings to talk about what food we want. I don't ask for foods I want, because I can't contribute to the food. There are things I want that I don't feel I can ask for, because I'm not bringing money into the house. Other women ask for foods they especially want. They get public assistance, or they have families who can help them. I don't want to ask, even though I know the staff are kindhearted and would get those foods for me. It's very hard.

Sometimes women from the program go shopping. I'd like to go with them; it's a nice walk to the store. But I don't even go, because I can't buy anything, and I feel embarrassed that everyone else has a little money and can buy something. So everyone else goes shopping, and I don't.

I need money for transportation to appointments with my probation officer, to the doctor, and to visit my daughter. Right now the program is helping me by paying for my transportation to appointments, but I am worried about how I will manage when I leave Interim House. I want to support my daughter, to take care of her, and to get her the things she needs. For now she's living with her grandmother, her father's mother. I'm trying to arrange to have her in transitional housing with me, when I finish at Interim House. I'm going to need to pay rent and utilities, and to buy clothes and food. I'm trying to figure out how to celebrate her birthday later this month.

I'm starting a GED and job training program this summer at Metropolitan Career Center. I'm looking forward to working, and I want to go to school, but I'm going to need money for work clothes and for child care, even to look for a job.

I'm trying to live a better way and I don't ever want to sell drugs again. I don't want to be beaten up again. I'm doing a lot for myself here at Interim House, but I'm going to need help to take care of myself and my daughter. Worrying about how I'm going to take care of myself and my daughter without any money makes it harder to focus on my recovery.

Please change the law so that women with felony drug convictions will be able to get cash assistance and food stamps. It will be most helpful to all women trying to live a better way.[17]

A study of women with drug convictions in Pennsylvania[18] found that:

- The overwhelming majority of the women had no prior drug convictions, and their felony convictions were for very small amounts of drugs (often only $5 or $10 worth).

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[17] Testimony of Tracey, Pennsylvania House Health and Human Services Committee Public Hearing on House Bill 1401 (June 15, 2001).

[18] The study included detailed interviews with over 30 law enforcement and public health officials and 26 women with drug convictions from four counties in Pennsylvania over a fourteen-month period during 1997-1998, as well as review of criminal court and drug treatment facility records from specific periods during 1996 and 1997, after the ban went into effect. Hirsch, supra note 1. *See also* Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses* (The Sentencing Project, Feb. 2002).

- They began their drug use as children or teenagers, often in direct response to sexual and/or physical abuse, or when they ran away to escape the abuse. One woman said:

  > When I was a child, my father used to rape me. It started when I was nine.... After I ran away, I wanted somebody to want me. I ran into this guy, he was older, and I wanted him to want me. He gave me cocaine. I was thirteen.[19]

- They have limited education, limited literacy, employment histories in short-term low-wage jobs, histories of homelessness and prostitution, multiple physical and mental health problems needing treatment, and have survived repeated and horrific violence as children and as adults.
- Jail is the first place they have been offered drug treatment, and the first context in which the abuse they have survived has been addressed. One woman described her situation:

  > I was in [the city jail], in the OPTIONS program, for drugs and alcohol. They had all different kind of classes — about being raped in the street, about being raped in your family. I needed both those classes.[20]

Because of the links between women's experiences of domestic violence and sexual assault and their alcohol and drug use and criminal convictions, many battered women's shelters and advocates have urged that the ban on benefits be eliminated.[21] Similarly, because the ban makes it more likely that women will relapse into active addiction and return to criminal activity, many members of the law enforcement community support lifting it. The Pennsylvania District Attorneys' Association describes lifting the ban as "an important anti-crime measure" and "sensible anti-crime legislation."[22] Many drug and alcohol treatment providers support lifting the ban in order to make it possible for women to complete treatment and stay in recovery.[23] The President of the Drug and Alcohol Service Providers Organization of Pennsylvania testified that lifting the ban "is an important step in helping restore families to recovery and to healing."[24] The number of states modifying or lifting the ban has continued to increase, although slowly.[25]

## Bench Warrants, Probation, and Parole Violations: Confusion & Procedural Complications

Parents with outstanding bench warrants, or who are in violation of probation or parole requirements, are ineligible for TANF, Food Stamps, and SSI until those problems are resolved.[26] Although the requirement that individuals be in compliance with the criminal justice system as a condition of receiving benefits sounds reasonable, in practice parents may lose benefits for an extended period of time as the result of administrative confusion and procedural complications. For example, hearings in criminal cases are often rescheduled multiple times. A mother who becomes confused about the date or time of a rescheduled hearing may have a bench warrant issued despite having appeared in court at the time she believed the hearing was to occur. Similarly, a father who inadvertently misses an appointment with a probation officer may be considered "in violation" of a condition of probation. Each of these individuals is at risk of losing benefits until the situation with the criminal justice system is not only resolved, but *proven* to have been resolved to the welfare department's satisfaction.

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[19] Quotation from Tanya in Hirsch, *supra* note 1, at 9.

[20] Quotation from Maria in Hirsch, *supra* note 1, at 14.

[21] Letter from Women Against Abuse to Members of the Pennsylvania General Assembly (Nov. 16, 2000), and letter from Pennsylvania Coalition Against Domestic Violence to State Senator Timothy F. Murphy (March 20, 2001), supporting legislation to lift the ban.

[22] Letter from Pennsylvania District Attorneys Association to State Senator Jane M. Earll (March 22, 2001).

[23] Letter from Interim House to State Senator Shirley M. Kitchen (March 16, 2001), and letter from Drug and Alcohol Service Providers Organization of Pennsylvania to State Senator Jane Earll (March 26, 2001).

[24] Testimony of Deborah Beck, MSW, President, Drug and Alcohol Service Providers Organization of Pennsylvania, Pennsylvania House Health and Human Services Committee Public Hearing on House Bill 1401 (June 15, 2001).

[25] Most recently, Massachusetts joined the list of states choosing to modify the ban. Legislation to opt out of the ban passed the Pennsylvania Senate at the end of June 2001, and is pending in the Pennsylvania House of Representatives.

[26] Federal law limits these provisions to felonies, but some states have extended the TANF provision to include bench warrants for misdemeanors, as well as applying this provision to General Assistance. *See, e.g.*, 62 P.S. § 432(9).

Similarly, payment of fines or court costs is often a "condition of probation," but an individual who is ineligible for public benefits may not be able to pay. Some probation departments recognize that receiving public benefits will assist individuals in complying with the terms of probation, and they complete the paperwork required by the welfare department to establish eligibility. Other probation departments do not consider assisting individuals with welfare department documentation as one of their responsibilities, and refuse to help. In these cases, the parent is stuck: she cannot prove that she is in compliance with probation and, therefore, cannot get the benefits she needs in order to pay fines and remain in compliance.

Other individuals are denied benefits on the basis of outstanding warrants of which they were unaware, or that belong to another individual with a similar name.[27] A local legal services program was contacted by a woman whose welfare caseworker told her that she had an outstanding warrant from another state, and that it was her responsibility to find out what jurisdiction the warrant was from and how to resolve it. That situation was resolved only after the legal services attorney intervened.

The Legal Action Center has developed a set of detailed recommendations for states on careful implementation of these provisions, with the goal of preventing unintended harmful consequences.[28] They urge states to define "violations" of conditions of probation or parole narrowly and to restore benefits as soon as the individual comes into compliance.

## TANF and Food Stamp Work Requirements

Typically, parents who are on probation or parole are required to meet with their probation or parole officers at regular intervals and usually during normal work hours. They also may need to appear in court or to participate in other activities — mental health or alcohol and drug treatment, or parenting classes — as a condition of probation or parole. Parents facing these requirements may have particular difficulty complying with the federal TANF and Food Stamp programs' stringent work requirements and with additional requirements imposed by state welfare programs.[29]

In order to receive TANF and Food Stamp benefits, these parents must attend welfare-to-work programs during particular hours. Absences, even for good reasons, may result in the parent being dismissed from the program, which in turn may result in the family being "sanctioned" (punished for noncompliance with work requirements by having benefits reduced or terminated, temporarily or permanently). At the same time, failing to meet probation and parole requirements can mean a return to jail or prison. Drug and alcohol treatment providers in various states report that their clients are receiving conflicting information about treatment and work requirements from welfare caseworkers, and are having difficulty complying simultaneously with treatment and work requirements.[30]

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[27] The federal Department of Agriculture has issued policy guidance clarifying that an individual cannot be denied Food Stamps on the basis of an outstanding warrant unless the individual has knowledge that a warrant has been issued, and urging that state Food Stamp agencies "give the individual an opportunity to submit documentation that the warrant has been satisfied." Policy Guidance from Arthur T. Foley, Director, Program Development Division, U.S. Department of Agriculture Food and Nutrition Service, to All Regional Directors, Food Stamp Program (Nov. 9, 2001), www.fns.usda.gov/fsp/MENU/APPS/ELIGIBILITY/Fleeingfelons.htm.

[28] Legal Action Center, *Getting To Work: How TANF Can Support Ex-Offender Parents in the Transition to Self-Sufficiency* (April 2001); Legal Action Center, *Making Welfare Reform Work: Tools for Confronting Alcohol and Drug Problems Among Welfare Recipients* (Sept. 1997).

[29] The federal TANF statute requires most parents to engage in approved work activities. *See* Mark Greenberg and Steve Savner, *A Detailed Summary of Key Provisions of the Temporary Assistance for Needy Families Block Grant of HR 3734* (Center for Law and Social Policy, Aug. 1996) for more information on TANF work requirements. States are permitted to impose additional work requirements on TANF recipients. The Food Stamp Act also requires individuals to engage in employment and training activities.

For example, a methadone drug treatment program that serves many women with criminal records called the local legal services program for help. Several mothers in the program had been threatened with termination from a welfare-to-work program because they required an additional ten minutes at lunchtime to get to and from the methadone program. The welfare-to-work program was refusing to accommodate their need for daily treatment, and the women and staff feared that the women would have to choose between participating in the welfare-to-work program and continued drug treatment.

Other welfare requirements may also place a parent's recovery from alcohol or drug addiction in jeopardy or cause her to violate the terms of her probation or parole. Staff from another women's drug treatment program called a legal services program for help when the local welfare office demanded that women participating in the program obtain letters verifying their prior living arrangements and past income from prostitution.[31] This would require that the women return to drug corners and crack houses, putting their recovery and their safety at risk. Assistance by the legal services program resolved this issue, but similar problems occur in many locations and most individuals are unrepresented.

Even where ex-offender parents can meet the welfare work requirements, the work activities to which they are assigned may not, in many cases, be activities that make sense in the context of their current situations. Many parents with criminal records struggle with alcohol or other drug addictions and with other mental and physical illnesses. The Arrestee Drug Abuse Monitoring Program of the National Institute of Justice conducted interviews and drug tests with more than 30,000 arrestees in 35 metropolitan areas during 1998. At most of the program sites, approximately two-thirds of the adult arrestees tested positive for at least one drug.[32] Although 83 percent of state prisoners report a history of drug and/or alcohol use, only 12 percent received drug and alcohol treatment while imprisoned.[33]

While limited data are available on the extent of mental illness among incarcerated individuals, some estimates suggest that rates of mental illness among prisoners are two to four times as high as in the general population.[34] One study found that 23 percent of mothers and 13 percent of fathers in state prison had mental illness.[35] Ex-offenders returning to the community often have great difficulty accessing drug, alcohol, and mental health treatment upon release.[36] For these parents, medical or behavioral health treatment may be the most appropriate pre-employment activities. Yet the federal TANF statute severely limits the types of activities that states can count towards the federal work participation requirements,[37] thus making it more difficult for states to provide treatment and supportive services and for parents to participate in them.

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[30] For examples, see Legal Action Center, *Steps to Success: Helping Women with Alcohol and Drug Problems Move from Welfare to Work* 18, 21 (May 1999).

[31] An analogous issue arose when a welfare caseworker insisted that a client in treatment for alcoholism return to the bar where she had met the father of her child, in hopes of seeing him and learning his current address for use in child support proceedings. Again, the problem was resolved without the client jeopardizing her recovery only because the treatment program referred her to the local legal services office.

[32] U.S. Department of Justice, National Institute of Justice, Arrestee Drug Abuse Monitoring Program, *1998 Annual Report on Drug Use Among Adult and Juvenile Arrestees.*

[33] Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners, 1997* (U.S. Department of Justice, Bureau of Justice Statistics, Jan. 1999 (revised March 11, 1999)).

[34] Jeremy Travis, Amy L. Solomon, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 29 (Urban Institute, June 2001) (hereinafter "Travis").

[35] Mumola, *supra* note 16, at 9.

[36] Travis, *supra* note 34.

## Caseworker Confusion and Verification Problems

> Deanna, homeless and struggling with mental illness, was denied benefits at the welfare office because her caseworker was sure that Deanna's criminal record made her ineligible for cash assistance and Food Stamps. When she walked into the legal services office, she was living in a small homeless shelter, where she was not permitted to make phone calls, and had no carfare to get to her outpatient mental health treatment or to the alcohol and drug treatment program in which she was trying to enroll.[38]
>
> Deanna has a felony drug conviction: she was arrested on August 18, 1996, and convicted in 1997. She also has a later misdemeanor drug conviction. Neither of these convictions makes her ineligible for benefits; the ban applies only to *felony* drug convictions and only to convictions for conduct *after* August 22, 1996.
>
> Deanna had been trying to get benefits for three weeks, without success. Initially, the caseworker insisted that the felony drug conviction made Deanna ineligible, erroneously focusing on the date of conviction, rather than the date of conduct. After a legal services attorney faxed the caseworker the welfare department handbook section stating that the date of conduct was what mattered, the caseworker and her supervisor then insisted that the misdemeanor conviction must actually be a felony conviction, and that benefits could not be approved without verification from a probation officer that the later conviction was for a misdemeanor.
>
> Because she had successfully completed her jail sentence and her probation, Deanna did not have a current probation officer, and the welfare office did not want to accept Deanna's, or her lawyer's, assertions that the conviction was for a misdemeanor. Deanna's former probation officer gave her a copy of her criminal record printout from the court computer but would not provide further documentation since Deanna was no longer in her caseload.
>
> When a copy of Deanna's criminal record and of the relevant state statutes defining the crime as a misdemeanor were provided to the welfare office, the caseworker and supervisor responded: "How do we know you [the lawyer] didn't just make that up?" Deanna's benefits were approved only after her attorney called supervisors at multiple levels of both the welfare department and probation office hierarchies. Without the intervention of an attorney who was experienced in the intersection of criminal and public benefits law, Deanna would have waited several months, without benefits, for an administrative appeal hearing and decision. Even with the attorney's expertise, it took ten days, and many hours of advocacy, before Deanna received her benefits. In the interim, she had no resources whatsoever.

Deanna's case illustrates the confusion surrounding implementation of welfare rules concerning criminal records. Parents leaving prison are given no official documentation explaining their offense and whether it was a misdemeanor or a felony, let alone the date that the offense was committed. Welfare caseworkers often don't know what constitutes a felony drug offense or how to read a criminal record printout correctly. Individuals who have "maxed out" (served their entire maximum sentences) and who therefore do not have probation or parole agents have no way to verify that they have paid their fines in full, or, alternatively, to set up a payment plan for their fines. As a result, they are unable to receive benefits. Other parents are wrongfully denied benefits because caseworkers don't understand that only certain offenses make an individual ineligible or that the caseworker's belief that certain conduct is "criminal" is not a sufficient basis to deny benefits.

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[37] Section 407(d) of PRWORA, codified at 42 U.S.C. § 607(d).

[38] The Medicaid program should have paid for Deanna's transportation to medical care, but, as is common, the welfare office had not explained to Deanna that these funds were available and did not have a simple system in place to pay for medical transportation.

> When Maria came to the legal services office for help on another issue, the staff discovered that she was receiving TANF benefits only for her children and not for herself, although she appeared to be eligible. When asked why, Maria explained that the TANF caseworker had taken her off of the children's TANF grant nine months previously, after Maria told the caseworker that she had lost her job at a child care center because she had been investigated for possible child abuse as a teenager, many years earlier. Although Maria was never charged with a crime, let alone convicted of one, the welfare caseworker said: "That's a crime, and you can't get welfare benefits." Because she was taken off her children's grant, Maria was unable to get subsidized child care to enable her to find another job and was having great difficulty paying the rent. After intervention by the legal services program, Maria's TANF benefits were reinstated, enabling her to get child care and seek work.

The more complicated the rules are, the more likely it is that parents will wrongly be denied benefits as a result of caseworker confusion, client confusion, or the difficulties of getting acceptable verification.

## Policy Recommendations to Improve Access to Public Benefits

### Changes in Federal & State Law

**1. Allow individuals with unrelated criminal records to receive public benefits if they are otherwise eligible.**

Simplifying program rules to make criminal records for offenses other than public assistance fraud irrelevant to eligibility would both increase the chances of ex-offenders making a successful reentry into the community and simultaneously make program administration easier and less error-prone. The federal ban on TANF and Food Stamp benefits for individuals with felony drug convictions should be repealed, as should federal and state provisions denying Food Stamps, SSI, TANF, or General Assistance benefits to individuals as a result of bench warrants or probation or parole violations. In the alternative, states should adopt narrow definitions of what it means to be in violation of a condition or probation or parole, and make restoration of benefits upon compliance as simple and speedy as administratively possible.

**2. Allow pre-employment activities, including alcohol and drug treatment and mental health treatment, to count as work activities.**

The federal TANF statute requires that states enroll a certain percentage of TANF recipients in a restricted list of approved work activities.[39] States have the option of expanding the list of approved work activities, but individuals enrolled in activities that are not on the federal list do not count toward the federally required percentages. Expanding the federal list would give states greater flexibility in addressing the needs of parents with severe barriers to employment.[40]

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[39] Section 407(d) of PRWORA, codified at 42 U.S.C. § 607(d).

If we want ex-offender parents with behavioral health problems to move toward employment, we need to help them address those problems. Counting pre-employment activities, such as behavioral health treatment, as work activities would have the dual benefits of permitting parents in need of those services to focus on treatment, while allowing them to receive work-related support services, like subsidized child care, for participation in treatment.[41] Some states, like Pennsylvania, exempt individuals with disabilities from the work requirements while they are unable to work, and permit them to participate in employment and training activities as "exempt volunteers." However, Pennsylvania, like a number of other states, does not include behavioral health treatment (or other medical treatment) as an approved work activity, and does not fund child care for parents participating in drug and alcohol or mental or physical health treatment. Unsurprisingly, parents who are unable to obtain child care drop out of treatment. Considering treatment a work activity is one way to address this issue.

## Program Initiatives

**1. Develop programs to process public benefits *rapidly* for eligible individuals who are leaving prisons or jails, so that they can more appropriately reenter the community and lessen their chances of a revolving-door return to jail.**

Quick access to medical treatment upon release requires Medicaid or other health insurance.[42] For parents with HIV/AIDS, diabetes, or serious mental health conditions, an interruption in medications can be devastating. Similarly, parents who want alcohol and drug treatment need coverage in order to enter treatment programs. Prompt processing of TANF or General Assistance applications will help parents reunite with their children and avoid homelessness. Similarly, individuals with disabilities must begin the prolonged application processes for SSI or Social Security Disability benefits as early as possible.[43]

Two positive program initiatives toward these goals are described here:

- Four hospitals in the Harrisburg, Pennsylvania, area conducted outreach with the Dauphin County Prison in the spring of 2000, working with parents close to being released to enroll their uninsured children in the state Children's Health Insurance Program or Medicaid.[44]

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[40] *See, e.g.*, Testimony of Steve Savner, Senior Staff Attorney, Center for Law and Social Policy, House Committee on Ways and Means, Subcommittee on Human Resources (April 3, 2001); Eileen P. Sweeney, *Recent Studies Make Clear That Many Parents Who Are Current or Former Welfare Recipients Have Disabilities and Other Medical Conditions* (Center on Budget and Policy Priorities, Feb. 29, 2000); John M. Bouman, *A High Dive into a Water Glass? Serving the 'Hard to Serve' in Welfare to Work*, Clearinghouse Rev (Jan.-Feb. 2000).

[41] Some states do permit recipients to participate in behavioral health treatment as a work activity and/or provide supportive services, even though the states cannot count these activities toward the federal work percentages. A 1997 survey of state TANF administrators found that 29 states would count treatment as a work activity and 39 states would pay for child care during treatment. National Center on Addiction and Substance Abuse at Columbia University and the American Public Human Services Association, *Building Bridges: States Respond to Substance Abuse and Welfare Reform* 11 (1999). Other studies, however, report that lack of child care during treatment is a widespread problem. Legal Action Center, *Steps to Success: Helping Women with Alcohol and Drug Problems Move from Welfare to Work* 14 (May 1999). *See also* U.S. Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance, *Addressing Substance Abuse Problems Among TANF Recipients: A Guide for Program Administrators* 17, 24 (Aug. 2000).

[42] Individuals are not eligible for federally funded Medicaid while incarcerated, but "unless a state determines that an individual is no longer eligible for Medicaid, states must ensure that incarcerated individuals are returned to the Medicaid eligibility rolls immediately upon release, thus allowing individuals to go directly to a Medicaid provider and demonstrate his/her Medicaid eligibility [sic].... This policy is clearly advantageous for those whose incarceration is relatively brief. If they are released during a normal period of eligibility and before the State's usual, periodic redetermination of eligibility takes place, then our policy should ensure immediate resumption of [Medicaid] coverage upon their release." Letter from Tommy G. Thompson, Secretary of Health and Human Services, to Representative Charles B. Rangel (Oct. 1, 2001). However, there are significant concerns about states' implementation of this policy. Furthermore, this policy does not benefit parents who were not receiving Medicaid prior to incarceration, or whose incarceration is not relatively brief. These parents will need to complete the full Medicaid application process.

[43] The Social Security Administration has established procedures to allow incarcerated individuals who are nearing release to begin the application process, although many prisoners (and prison staff) are unaware of this. The process is made more difficult by the refusal of some prison medical care providers to complete disability evaluation forms.

- The Pennsylvania Department of Public Welfare and the Coordinating Office for Drug and Alcohol Abuse Programs of the City of Philadelphia Behavioral Health System have worked with the Philadelphia District Attorney's Office, the Defender Association of Philadelphia, Community Legal Services, and the AIDS Law Project of Pennsylvania on a pilot program for individuals in the city jail system who are eligible to be paroled into drug treatment programs, to ensure that they have Medicaid coverage effective the date of their release. Medicaid applications are begun while the individuals are still in jail, and Food Stamps, TANF, and General Assistance applications are processed shortly after release. As a result, the waiting time for transfer from jail to drug treatment programs has been shortened, the full range of health needs can be addressed immediately upon release, and the very limited funds available to pay for alcohol and drug treatment for uninsured individuals can be redirected to individuals for whom Medicaid funding is unavailable.[45]

Such programs benefit both the individual families involved and society, making it more likely that parents will successfully reconnect with their children, sustain recovery from alcohol and drug dependence, and avoid recidivism and reincarceration.

**2. Create targeted welfare-to-work programs that address the needs of parents with criminal records, recognizing that they must meet often conflicting requirements of the welfare, child welfare, and probation systems.[46]**

Welfare-to-work programs that do not recognize ex-offender parents' complex needs simply set these parents up to fail. For example, parents with criminal records should not erroneously be referred to training for jobs from which they are barred by law.[47] Welfare-to-work programs must accommodate a parent's need to report periodically to her probation officer, or to appear in court, or to participate in the mental health or addictions treatment program or parenting classes that may be a condition of her probation or parole or that are required by the child welfare system as a condition of reunification with her children.

## Conclusion

Access to public benefits can mean the difference between success and disaster for parents with criminal records. Here is the testimony of a parent with a criminal record, who was able to rebuild her life, reunite her family, and avoid relapse and recidivism because benefits were available to her:

> My name is Donna, and I work as an advocate in the domestic violence field in central Pennsylvania. The domestic violence shelter I work for serves victims of domestic violence and sexual assault.
>
> As part of our services, I run weekly support groups for women in the County Jail who are survivors of domestic violence and sexual assault. We work with the women while they are in prison, and also after they are released,

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[44] Minutes of the Pennsylvania Interagency Maternal and Child Health Outreach Committee Meeting (Jan. 20, 2000).

[45] Further information is available from Barry Savitz at the Coordinating Office for Drug and Alcohol Abuse Programs, City of Philadelphia Behavioral Health System, (215) 685-5425.

[46] For program design suggestions, see National Governors Association Center for Best Practices, *Addressing Substance Abuse and Mental Health Problems under Welfare Reform: State Issues and Strategies* (June 30, 2001), www.nga.org/center/divisions/1,1188,C_ISSUE_BRIEF^D_2392,00.html; Legal Action Center, *Getting To Work: How TANF Can Support Ex-Offender Parents in the Transition to Self-Sufficiency* (April 2001); Rebecca Brown, *Helping Low-Income Mothers with Criminal Records Achieve Self-Sufficiency*, Welfare Information Network Issue Notes (Dec. 2000); Maria Buck, *Getting Back to Work: Employment Programs for Ex-Offenders* (Public/Private Ventures, Fall 2000); Legal Action Center, *Making Welfare Reform Work: Tools for Confronting Alcohol and Drug Problems Among Welfare Recipients* (Sept. 1997).

[47] This issue is discussed further in chapter one of this report.

to help them escape violence and rebuild their lives and their children's lives.

I am here because I see how harmful the ban on benefits is for the women I work with, and because I know from my own life how important welfare benefits are when you are trying to turn your life around.

Although my supervisor and the director of the domestic violence shelter know about my history, I have never spoken publicly before about my own situation. I am telling you my story today because I see the women I work with who need the same help I got and who can't get it. I hope that telling you my story will help you understand why it is so important to change the law and allow women with felony drug convictions to get the help they need.

I am in recovery from addiction. When I was in my active addiction, I was convicted of drug felonies, about ten years ago. I was never offered any help while I was in my addiction; I feel like they were watching me die and, instead of offering me help, all they cared about was arresting me. I got myself off of drugs, and clean and straight, in jail. I started working in a grocery store on work release from the jail.

After I got out of jail, I was working part-time in the grocery store, but they wouldn't give me full-time hours, so I couldn't get health insurance. I was living in a rented room, because I couldn't afford an apartment, and I was walking back and forth to work, a long way, in the winter. I could not take care of my two young children on my salary, so they were staying with my mom. I was paying my court costs and fines, but I couldn't afford anything else, including medical care.

I collapsed at work, and was taken to the hospital. After I was in the hospital I learned that I could get welfare benefits and subsidized housing, which made it possible for me to survive and get my children back. Having my children back kept me strong and kept me from relapsing.

If the same things had happened to me now, instead of ten years ago, I wouldn't be able to get those benefits. I don't know where I would be today if I hadn't gotten welfare when I needed it.

The welfare benefits and low-cost housing made it possible for me to rebuild my life. Now I own a home and I have a steady job. I'm active in the PTA and in community service projects. My husband and I are raising five children. Our kids are all doing well in school. They're on the swim team and they play soccer, and they have summer jobs. I'm so proud of them, and I know they're doing well because I was able to raise them, and I wouldn't have been able to raise them if I hadn't been able to get benefits when I needed them.

I just graduated from Community College with an Associate's degree. I had a 3.97 grade point average and won the outstanding human service student award at graduation. Drugs are the farthest thing from my mind. I'm about to start studying for my B.A., and I'll continue working at the domestic violence shelter while I'm in school. Being able to get welfare when I needed it made it possible for me to change my life.

The women I work with now need help just as much as I needed it ten years ago. They have addictions, and they are survivors of domestic violence and/or sexual assault. While they are in jail we talk about safety planning for when they are released, and try to help them find alternatives to going back to abusive relationships.

Some of the women come to our shelter after they are released from jail, to get support and counseling. We try to help them find work and housing, but it is very difficult to find a job when you have a drug conviction and very difficult to find housing if you have a drug conviction and no income. I don't know what they are going to do.

I'm afraid that they will go back to abusive relationships, because they don't feel like they have any other choice. I have seen this happen. One of the women went back to her abuser just for a home plan to get out of jail. He beat her again and she ended up in our shelter, only to go to a drug and alcohol treatment program and come back to the shelter again. Housing and employment are terrible barriers for her. Welfare benefits are really a lifeline for women who are being abused.[48]

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[48] Testimony of Donna, Pennsylvania House Health and Human Services Committee Public Hearing on House Bill 1401 (June 15, 2001).

# Appendix A:

## States Choosing to Eliminate or Modify the Ban on Benefits for Individuals with Felony Drug Convictions (as of January 2002)

*States that have eliminated the ban:*

Connecticut
District of Columbia
Idaho
Michigan
New Hampshire
New Mexico
New York
Ohio
Oklahoma
Oregon
Vermont

*States that have modified the ban:*

Arkansas
Colorado
Florida
Hawaii
Illinois
Iowa
Kentucky
Louisiana
Maryland
Massachusetts
Minnesota
Nevada
New Jersey
North Carolina
Rhode Island
South Carolina
Texas
Utah
Washington
Wisconsin

Sources: Legal Action Center, National Governors Association, Center on Budget and Policy Priorities, state websites, and calls to states.

## Chapter Three

# Criminal Records and Subsidized Housing:

## Families Losing the Opportunity for Decent Shelter

*Rue Landau*

## Introduction

Shirley recognized the warning signs when her 16-year-old son turned to drugs.[1] Until then, he had been a good kid who got good grades and participated in a variety of community activities. Shirley — who had already successfully raised two adult daughters and was successfully raising a 14-year-old daughter — did everything she could to keep her family together. She talked to her son. She talked to his teachers and school counselor. She even reduced her minimum wage work hours to be around more. While the loss of income caused serious problems for the family, Shirley was desperate to help her son. When she found illegal drugs in her son's room, she reported it to the police and had him arrested. When he violated probation, she reported it to the police and her son's probation officer. When her son was finally arrested again and placed in a juvenile institution, Shirley's "Section 8" rental assistance was terminated and she and her daughter were rendered homeless.[2] Sadly, Shirley and her family were casualties of the federal Department of Housing and Urban Development's (HUD) punitive "one-strike-and-you're-out" eviction policy.

Until their eviction, Shirley's family was one of almost five million families living in publicly owned or subsidized housing in the United States. Her termination from subsidized housing, like thousands of others contested in the courts each year, resulted from the federal government's attempt to reduce crime and drug-related criminal activity in federally funded housing properties. Ironically, Shirley deeply understood the seriousness of drugs and crime in subsidized housing. Even as she fought to keep drugs out of her neighborhood and her home, she was penalized by an overly strict reading of the law that punishes innocent residents for the criminal conduct — and even alleged criminal conduct — of others.

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[1] Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

[2] When a family is "terminated" from the Section 8 program, its rental subsidy ends. Since most low-income families cannot afford to pay market rents, a termination usually leads to the family's eviction.

As part of its overall war on drugs and crime in the 1980s and 1990s, the federal government implemented policies to penalize offenders who live in, or want to live in, federally funded housing. Specifically, Congress amended the U.S. Housing Act in 1988 to prohibit admission to applicants and to evict or terminate assistance to residents who engage in certain types of criminal activity — and applied the same penalties to residents whose family members or guests engage in those activities.[3] In his 1996 State of the Union Address, President Clinton lit fire to this policy when he challenged tenant associations and local housing authorities to rid their communities of gang members and drug dealers. He proclaimed that the rule for residents who commit crimes and sell drugs would be "one strike and you're out."[4]

For families trying to enter subsidized housing, the one-strike policy acts as a bar to admission for anyone with a criminal record. While the policy may have been designed to promote safe, livable communities, it actually denies ex-offenders an opportunity to restart their lives and reintegrate into their communities. Using applicants' criminal backgrounds as a litmus test penalizes ex-offenders who have already paid their debts to society. Moreover, barring ex-offenders from affordable, secure housing seriously undermines their efforts to find and retain employment and to reunify their families. In the wake of welfare reform, the potential impact is devastating: the policy threatens to eliminate one of the few remaining supports for many low-income families who may lose cash assistance because of time limits, sanctions, or criminal records.

Local housing authorities have also used the one-strike policy to summarily evict and impose strict liability on entire tenant households for the criminal acts, or alleged criminal acts, of one person. Shirley's case is not an anomaly, but rather typical of cases throughout the country in which innocent tenants and other household members are punished for the acts of others, even when they have done everything within their power to live in drug- and crime-free households. Over-broad implementation of the one-strike rule by local housing authorities has wrought serious consequences for low-income families. Since an entire tenant household can be evicted for the alleged wrongful acts of one individual, thousands of low-income people are put at risk of dislocation and even homelessness. Worse still, once a family is evicted from subsidized housing it may be years before they can be readmitted.

Local housing authorities' interpretation and enforcement of the restrictions on applicants and tenants involved in alleged criminal activity must be examined critically — not only because of concerns about successful reintegration of ex-offenders into their communities but also because these policies have a wide and distressing impact on communities. Under HUD's one-strike policy, many low-income families will never have the opportunity to rent subsidized housing because of crimes they or their family members committed long before they reached the top of the waiting list. Thus, lawmakers and housing authorities must exercise their power with discretion and care. For families already living in subsidized housing, the policy threatens to undermine family unification and stability, particularly for innocent family members not responsible for the criminal activity.

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[3] Anti-Drug Abuse Act of 1988, P.L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988), codified at 42 U.S.C. § 1437d(l)(5).

[4] U.S. Department of Housing and Urban Development, *"One Strike and You're Out" Policy in Public Housing*, PIH (HUD Office of Public and Indian Housing) 96-16, Apr. 12, 1996 (hereinafter "HUD 'One Strike and You're Out' Policy").

In the following pages, we present a brief background on subsidized housing, examine the law regarding criminal activity in this context, review current enforcement of the law, and pose questions raised by this enforcement. Although the focus of this section is on subsidized housing, it is important to also recognize that increasingly many private landlords are performing criminal background checks and refusing to rent to individuals with criminal records. We focus on subsidized housing because the prohibitions to renting are imbedded in the law, rather than solely in the landlord's discretion; however, the barriers in the private housing market must be kept in mind since families with criminal records who are denied subsidized housing may be left with very few options.

## Background on Subsidized Housing

Millions of American families lack safe, decent, and affordable housing.[5] Despite the strong economy of the 1990s, housing costs rose faster than low-income people's wages in that decade. A recent report by the National Low Income Housing Coalition (NLIHC) noted that, as of 1999, "[i]n no local jurisdiction in the United States [could] a full-time minimum-wage worker afford the fair market rent for a one-bedroom unit in their community."[6] In addition, in 70 metropolitan areas, minimum-wage workers would have to work more than 100 hours a week to afford the fair market rent.[7] In this context, federal programs that were established to provide decent, safe, and affordable rental housing play a crucial, even life-preserving, role for millions of eligible low-income families. Because tenants can generally limit their rent to 30 percent of monthly income, federal subsidized housing programs are essential to maintaining a decent standard of living for low-income families.[8]

In 1999, almost five million low-income families were able to rent affordable homes because of the federal public housing and Section 8 programs.[9] Millions more remain on these programs' waiting lists. In this report, we focus on three main types of subsidized housing: public housing, the Section 8 voucher program, and project-based Section 8. We refer to the three programs collectively as "subsidized housing" and make distinctions where necessary. Here is an overview.

- *Public Housing* — There are approximately 1.2 million households living in public housing units in the United States. Public housing developments and scattered site homes are owned and usually operated by over 3,400 local public housing authorities (PHAs).
- *Section 8 Program*
  - The major federal subsidized housing program is tenant-based Section 8 (*vouchers*). There are more than 1.5 million families in this program who rent from private landlords; HUD subsidizes these rents.
  - There are another 1.3 million families in *project-based* Section 8, where the units, rather than the tenants, are subsidized.

[5] As of 1999, 33 percent of the 102.8 million households in the United States were renters. In all, 39 percent of renter households were very low income, with incomes below 50 percent of area median. Twenty-two percent had incomes below 30 percent of area median. The National Low Income Housing Coalition (NLIHC) reports that homeowners are almost twice as affluent as renters: the median income of renter households was only 52 percent of the median owner income. Minority households are disproportionately represented in the renter market. Most minority households were renters: 53 percent of African-Americans, 55 percent of Hispanics, and 50 percent of other minorities. In contrast, only 26 percent of white households rented. National Low Income Housing Coalition *2001 Advocate's Guide to Housing and Community Development Policy*, available at www.nlihc.org (hereinafter "NLIHC 2001 report").

[6] National Low Income Housing Coalition *2000 Advocate's Guide to Housing and Community Development Policy* (hereinafter "NLIHC 2000 report").

[7] *Id.*

[8] 42 U.S.C. § 1437a. Some tenants in the Section 8 voucher program can now pay up to 40 percent of their income in rent. 42 U.S.C. § 1437f(o)(3) (1998).

[9] NLIHC 2000 and 2001 reports, *supra* notes 6 and 5.

Two-thirds of these families include members who are elderly or disabled.

- Approximately 800,000 families live in smaller HUD programs or rural housing programs.[10]

Affordable housing is crucial to keeping low-income families together. It leads to housing stability, reducing the chances that families will have to undergo many moves, or, worse yet, be evicted. Families that lack stable housing cannot focus on finding and maintaining employment. They also face the possibility that their children will be taken from them and placed in foster care (or, if the children are already in foster care, that they may not be able to reunify the family). Thus, the consequences of being deprived of affordable and stable housing threaten the well-being of the entire family.

## The Law Regarding Criminal Activity and Subsidized Housing

### History of the Law

Beginning in 1988, Congress amended the U.S. Housing Act to deny admissions and mandate evictions for alleged criminal activity. Public Housing Authorities (PHAs) can now perform criminal background checks prior to admission.[11] They also must now include a provision in their lease agreements that tenants and their families can be evicted for the criminal behavior of a household member, guest, or "other person under the tenant's control."[12]

Since the initial 1988 amendments, Congress has amended the Act several more times, making the language stricter and more specific.[13] These changes have had a devastating effect on families that need stable housing by excluding them from subsidized housing for criminal acts that may be remote in time or not attributable to them at all.

### Admissions

**1. Criminal Backgrounds Barring Admission**

The amendments to the U.S. Housing Act have created substantial barriers for ex-offenders seeking admission to subsidized housing. Local housing authorities are charged by law with screening "family behavior and suitability for tenancy" in subsidized housing.[14] Pursuant to this mandate, PHAs have the right to conduct criminal background checks on adult applicants before approving their admission to subsidized housing units.[15] In general, a PHA can deny admission to adult applicant family members who have a history of crimes of physical violence to people or property, or of other criminal acts that would adversely affect the health, safety, and welfare of other tenants.[16] Using this broad language, local PHAs set the parameters for admission to their programs, often broadly excluding many ex-offenders whose crimes were minimal, or for which they have been fully rehabilitated. In Philadelphia, for example, the PHA has defined "criminal activity" that might lead to denial of admission to include misdemeanors and even pending criminal charges. Crimes on the Philadelphia list include car theft, disorderly conduct, harassment, and misdemeanor drug possession.[17]

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[10] NUHC 2000 and 2001 reports, *supra* notes 6 and 5; Center for Budget and Policy Priorities, *Demographics of Major Federal Housing Programs* chart with statistics compiled by HUD, http://www.hud.gov/mtcs/public/guest.cfm.

[11] 24 C.F.R. § 5.903.

[12] The 1988 changes read, "[a] public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity ... on or near public housing premises ... and such criminal activity shall be cause for termination of tenancy." Anti-Drug Abuse Act of 1988, P.L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988), codified at 42 U.S.C. § 1437d(*l*)(5).

[13] The concept of "criminal activity" was amended to include "any drug-related criminal activity." Cranston-Gonzalez National Affordable Housing Act, P.L. No. 101-625 § 504,110 Stat. 834, 838 (Nov. 28, 1990), amending the statute by adding 42 U.S.C. § 1437d(*l*)(5) (now 42 U.S.C. § 1437d(*l*)(6)). As of 1996, PHAs could evict tenants for conduct performed "on *or off* the premises" as opposed to merely "on *or near* the premises" (emphasis added). Housing Opportunity Program Extension Act, P.L. No.105-276, 512(b)(1) (Oct. 21, 1998). Amendments added in 1998 limit tenants' procedural rights to contest a PHA's decision to evict. *Id.* The 1998 amendments also authorize PHAs to terminate a tenancy when the use of illegal drugs or abuse of alcohol by any household member affects the rights of other tenants. 42 U.S.C. §1437d(*l*)(7)(second 7) (1998).

[14] 24 C.F.R. § 960.203(c).

[15] 42 U.S.C. § 1437d(q) (1998).

[16] 24 C.F.R. § 960.203(c)(3) and § 982.552(c)(1) (However, as explained elsewhere in this paper, PHAs have discretion to look to mitigating circumstances when deciding whether or not to admit an applicant family.)

Under the law, PHAs must also establish standards to deny admission to applicants whom they determine to be using a controlled substance, or whose pattern of using controlled substances or alcohol would interfere with the health, safety, or peaceful enjoyment of the premises by other residents.[18] The law gives the PHAs broad discretion to exclude these applicants, but it does not provide guidance to PHAs about how to make these determinations. While a PHA is not required to consider the applicant's rehabilitation in making its decision, such consideration is permitted. An applicant who has successfully completed a drug treatment program, for example, or who is currently in treatment and no longer using illegal substances, may be admitted after the PHA scrutinizes the circumstances of her recovery.[19]

### 2. Due Process Prior to Denying Admission

If a PHA intends to deny an applicant admission to public housing, it must furnish the applicant with a copy of her criminal record and give her the opportunity to dispute its accuracy or relevance.[20] Under federal regulations, PHAs may consider the time, nature, and extent of the applicant's conduct and factors that might indicate a probability of positive future behavior, including evidence of rehabilitation.[21] In Philadelphia, for instance, mitigating circumstances can include the number or frequency of arrests, whether the arrests were recent, and the nature of the criminal activity. In addition, the PHA can weigh the applicant's current lifestyle and behavior and the length of time the applicant has been engaged in positive, "socially acceptable" conduct.[22]

But while PHAs can use discretion when screening applicants, they often default to rigid enforcement of the rules, denying ex-offenders access to needed subsidized housing. For example:

> In 1961, Frank was caught shoplifting and pled guilty to a charge of grand theft. He served jail time. He had no further brushes with the law in the years that followed and was a productive member of society. Many years later, Frank, now a senior citizen, applied for admission to public housing. His application was rejected because of his four-decade-old criminal record.

Ironically, in many cases access to affordable housing may be the key factor in making the kinds of changes that would permit a PHA to judge someone "socially acceptable." Employment and family reunification may be impossible for a person who can't find affordable housing. The goals of rehabilitation cannot be accomplished if families are confined to ex-offender status and are not given essential opportunities to rebuild their lives.

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[17] Philadelphia Housing Authority, *Policy Governing Admissions and Continued Occupancy for the HUD-Aided Low Rent Public Housing Program* (hereinafter "Philadelphia Admissions and Occupancy Policy").

[18] 42 U.S.C. § 13661(b)(1) (1998).

[19] 42 U.S.C. § 13661(b)(2) (1998).

[20] 42 U.S.C. § 1437d(q)(2) (1998).

[21] 24 C.F.R. § 960.203(d).

[22] Philadelphia Admissions and Occupancy Policy, *supra* note 17.

## Evictions

### 1. Little Proof, A Lot of Harm

As with admissions, the law gives PHAs wide discretion in defining what kind of criminal conduct will precipitate eviction proceedings. For public housing, the regulations allow a PHA to "evict the tenant by judicial action for criminal activity...if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted of such activity and without satisfying the standard of proof used for a criminal conviction."[23] The PHAs can prove an eviction case by a mere preponderance of the evidence — that is, that it is more likely than not that the criminal activity occurred. In addition, HUD has recently increased the pressure on Section 8 landlords to evict tenants on the basis of drug or criminal activity. A PHA may decide not to enter into a contract with a landlord who refuses or has a history of refusing to evict tenants who engage in such activity.[24]

### 2. Guilt by Association

One of the most controversial aspects of the one-strike policy is the wide net it casts to penalize innocent tenants for the bad acts of others. Generally, PHAs have the authority to evict entire families when one member of the family, or a guest of the family, commits (or is believed to have committed) a crime. The governing law permits an eviction for any alleged drug-related criminal activity "*on or off* the premises by any tenant, member of the tenant's household, or guest, and any such activity engaged in *on the premises* by any other person under the tenant's control."[25] It also permits an eviction for "any criminal activity ... that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents ... or ... by persons residing in the immediate vicinity of the premises."[26]

There has been a great deal of inconsistency regarding judicial interpretation of the one-strike policy. While some courts have resisted holding a whole tenant household liable for the conduct of one member or a guest, others have supported a rigid standard of liability. In one San Francisco case, a court upheld an eviction even though the tenants forced their son to move out after he was arrested for possession of drugs:

> David and Ruth lived with their son, daughter, and granddaughter in a subsidized housing unit. Their son, Philip, was on probation for a non-drug-related offense. During a routine search of his belongings, pursuant to his probation, four packets of narcotics were found in the pocket of a jacket in his bedroom closet. Philip was arrested. His parents insisted that he move out. Relying on a zero-tolerance clause for criminal activity in the family's lease, the court upheld the eviction of the whole family and the family became homeless.[27]

Similarly strict readings of the one-strike policy have been applied by housing authorities, regardless of whether the offending party was on the lease, resided at the property, or had a familial relationship to the tenant. Evictions of entire families were upheld in court where the alleged offender was, for example, an acquaintance of the tenant's daughter, an emergency babysitter, or an estranged husband.[28]

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[23] HUD 'One Strike and You're Out' Policy, *supra* note 4 and 24 C.F.R. § 966.4(*l*)(5)(iii). For Section 8, the regulations allow the PHA to terminate assistance if "the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity." 24 C.F.R. § 982.553(c) (2001).

[24] 42 U.S.C. § 1437f(o)(6)(C) (1998).

[25] 42 U.S.C. § 1437d(*l*)(6) (1998); 24 C.F.R. § 966.4(*l*)(5)(i)(B) (2001) (emphasis added). In Section 8 cases, the proscribed activity must occur "on or near" the premises to trigger a termination. 42 U.S.C. § 1437f(o)(7)(D) (1998). In public housing, however, an eviction can proceed if the activity occurs "on or off" the premises. While the 1996 revision to the statute specified "on or off" the premises, as discussed above, the HUD regulations retained the language "on or near" the premises until the 2001 revision of the regulations.

[26] 24 C.F.R. § 966.4(l)(5)(ii) (2001).

[27] *City of South San Francisco Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367 (Cal. App. Dep't Super. Ct 1995).

Other courts rejected using a strict enforcement of the eviction policy, and instead crafted parameters for determining whether a tenant was liable for an offending party's conduct. Many courts looked at a tenant's liability from the perspective of "knowledge" and "control" — if the tenant had "knowledge" and/or "control" over the offending party or the party's conduct, an eviction based on that conduct was usually legitimate under the law. Still, other courts held "foreseeability" and "consent" of conduct as the relevant factors.

> Tara was the mother of three young children. In February of 1998, she asked the father of her youngest child to watch the children while she went to do laundry. While he was babysitting in Tara's apartment, the police executed a search warrant and found drugs in his possession. He told the police the drugs belonged to him. Due to his arrest, the local housing authority started eviction proceedings against Tara and her family. Ultimately, the court concluded that eviction would only be appropriate if the tenant knew or should have known of the illegal drug activity and failed to take reasonable steps to prevent it. Tara and her family were allowed to stay.[29]

For the courts that have used strict enforcement of one-strike evictions, the concepts of "knowledge" and "control" have been broadly construed. When conduct occurred in a tenant's house or the indicia of wrongful conduct was found within a tenant's household — regardless of the tenant's knowledge or consent — such conduct was held to be constructively under a tenant's control and thereby legitimate grounds for eviction.

> Mai lived with her four youngest children, including her 17-year-old son, K.Y. On June 17, 1997, while Mai was out-of-state, K.Y. was involved in a drive-by shooting in which three people were shot. The following day, firearms were found inside Mai's apartment. Even though the housing authority stipulated that Mai did not have any knowledge of her son's activities, nor any reason to anticipate them, she and her family were evicted solely because K.Y.'s actions breached the terms of their lease.[30]

In most of these cases, the entire family or at least the offending family member was forced to leave the unit. Often a family was evicted before a final determination was made on underlying criminal allegations. Most egregious is the fact that an entire family can be evicted even if all of the criminal charges against the alleged offender are ultimately dismissed. The injustice to the family is heightened by long waiting lists for readmission and a decreasing stock of affordable housing. For these families, an eviction from subsidized housing may lead to years of economic hardship and dislocation.

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[28] *Housing Authority of New Orleans v. Green*, 657 So.2d 552 (La. Ct. App. 1995), *cert. denied*, 661 So.2d 1355, *cert. denied*, 517 U.S. 1169 (1996) (acquaintance of daughter). *Syracuse Housing Authority v. Boule*, 265 A.D. 2d 832, 701 N.Y.S. 2d 541 (N.Y. App. Div. 1999) (emergency babysitter). *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996) (estranged husband).

[29] *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504 (Tenn. 2001). *See also, Housing Authority of City of Pittsburgh v. Fields*, 772 A.2d 104 (Pa. Cmwlth Ct 2001), where a court ruled that the housing authority could not evict a tenant because she did not have knowledge or control of her adult son's criminal activity. The tenant's 23-year-old son was arrested and charged with possession of a controlled substance with intent to deliver and resisting arrest. He was arrested in the courtyard in front of their house.

[30] *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999). Note the Senate's original intent for these evictions: "[T]he ultimate decision to evict a family 'remains a matter for good judgment by the PHA ... based on the factual situation. The statutory policy does not restrict the PHA's ... exercise of wise judgment, weighing the interest of all concerned.' For example, the Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [*sic*]." S. Rep. No. 101-316, at 127 (1990).

### 3. Department of Housing and Urban Development v. Rucker

As this paper was going to publication, the U.S. Supreme Court handed down its ruling in *Department of Housing and Urban Development v. Rucker*, a decision that advocates for strict enforcement of the one-strike policy had anxiously been awaiting.[31] The Supreme Court's decision resolved much of the confusion over the legal standard for evictions for the criminal conduct of someone other than the leaseholder. While the *Rucker* decision certainly clarified many of the ambiguities, it is still unclear exactly how the ruling will affect evictions around the country.[32]

The facts in *Rucker* illustrate the draconian nature of these eviction cases and how they threaten family security:

> The Rucker case involved four tenants, the first of whom was a 63-year-old woman, Pearline Rucker, who had lived in public housing since 1985 with her daughter, two grandchildren, and a great-grandchild. The local Oakland Housing Authority (OHA) sought to evict the entire household because her daughter, who is mentally disabled, was found with cocaine three blocks from the apartment. Rucker testified that she regularly searched her daughter's room for evidence of drugs and alcohol, but had never found anything.
>
> The second and third tenants were Willie Lee, age 71, who has lived in public housing for over 25 years, and Barbara Hill, age 63, who has lived in public housing for over 30 years. Both Lee and Hill live with their grandsons. The OHA tried to evict them because their grandsons were caught smoking marijuana together in the parking lot. Neither Lee nor Hill had any prior knowledge of their grandsons' drug activity.
>
> The fourth tenant was Herman Walker, a disabled 75-year-old tenant who cannot live independently and relies on the help of a caregiver. Within a two-month time frame, Walker's caregiver and two guests were found with cocaine in Walker's apartment. Walker eventually fired the caregiver. The OHA proceeded with Mr. Walker's eviction.[33]

Until the decision by the Supreme Court, the Ninth Circuit's decision in Rucker reflected the most unambiguous statement to date that "Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants."[34] The Ninth Circuit enjoined the evictions of the four tenants on the basis that the tenants were innocent of the illegal activity, could not have reasonably foreseen the activity, and took all reasonable steps to prevent the activity.[35] In its decision, the court highlighted what it thought were absurd results from the law: "We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation."[36]

The U.S. Supreme Court disagreed. It found that the statutory language was unambiguous and that local PHAs can evict tenants "for the drug-related criminal activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[37] While the Court permitted the evictions of the *Rucker* tenants, it highlighted that the statute "does not *require* eviction...[i]nstead it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, ... 'the seriousness of the offending action,'... and 'the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action.'"[38] As has been illustrated by the cases in this paper, giving such latitude to local PHAs has led to devastating results for many innocent, low-income tenants.[39] Even in the *Rucker* case, HUD conceded that "there was nothing more Pearline Rucker could have done to protect herself from eviction," but it argued that the statute authorized her eviction nonetheless.[40]

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[31] *Rucker v. Davis;* 203 F.3d 627 (9th Cir. 2000), *rev'd en banc*, 237 F.3d 1113 (9th Cir. 2001) *rev'd sub nom. Dept. of Housing & Urban Development v. Rucker*, 122 St. Ct. 1230, 535 U.S. ___ (2002).

[32] For example, what impact will *Rucker* have on Section 8 tenants? As to public housing, will federal law and regulations preempt state eviction laws that create an "innocent tenant" defense?

[33] *Rucker v. Davis*, 237 F.3d 1113, 1117 (9th Cir. 2001).

[34] *Id.* at 1127.

[35] *Id.* at 1126.

[36] *Id.* at 1124.

[37] *Dept. of Housing & Urban Development v. Rucker*, 122 S. Ct. 1230, 535 U.S. ___ (2002).

Not surprisingly, the announcement in *Rucker* has led to an outcry of public opinion criticizing the law and its inherent unfairness. Ironically, within a week of the decision, the Oakland Housing Authority decided to allow all of the tenants in the *Rucker* litigation, except one, to stay.[41] For tenant advocates, the appropriateness of allowing the innocent tenants to remain has always been clear.

### 4. Mitigating Circumstances

One of the issues in *Rucker* was whether PHAs have to look to mitigating circumstances before deciding to evict a family for the criminal activity of a household member or guest. Originally, some members of Congress proposed legislation with the expectation that PHAs would act judiciously in taking as extreme an action as eviction. The legislative history is clear on this point:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.[42]

Until they were revised in 2001, the regulations reflected that intent — PHAs were required to exercise discretion in deciding to evict for criminal activity.[43] Since their revision, weighing mitigating factors and scrutinizing each eviction case by case has become optional.[44] The message that the PHA is not required to consider mitigating factors was reinforced by the ruling in *Rucker*.

### 5. A Bar to Getting Back In

Once a family is evicted from public housing, it may be years before it can be readmitted. The statute specifies that anyone who was evicted from public housing or Section 8 for drug-related criminal activity is ineligible for admission for three years.[45] The person can be exempted from the three-year ban, however, if she successfully completes a PHA-approved drug rehabilitation program *or* if the PHA determines that circumstances surrounding the activity no longer exist.[46]

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[38] *Id.*

[39] On April 16, 2002, one week after the Supreme Court announced the decision in *Rucker*, the Secretary of HUD wrote a letter to every PHA Director in the country instructing them "to be guided by compassion and common sense in responding to [these] cases..." He urged the PHAs to enforce the household responsibility clause of the lease responsibly, reasoning that "applying it rigidly could generate more harm than good." In his words, "eviction should be the last option explored, after all others have been exhausted."

[40] *Rucker*, 237 F.3d 1113,1124.

[41] *Despite High Court Ruling, Three of Four Oakland Tenants Stay*, Associated Press, April 6, 2002.

[42] S. Rep. No. 101-316 at 179. This legislative history had been cited by the en banc Court of Appeals in *Rucker v. Davis*, 237 F. 3d 1113, 1123 (9th Cir. 2001). However, the U.S. Supreme Court noted that this language applied to a provision passed by the Senate but rejected in Conference. *Dept. of Housing & Urban Development v. Rucker*, 122 S. Ct. 1230, 1234 n. 4, 535 U.S. ____ , n. 4 (2002).

[43] 24 C.F.R. 966.4(l)(5) (2000).

[44] The language now reads: "[T]he PHA *may* consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action." 24 C.F.R. § 966.4(1)(5)(vii)(B) (2001) (emphasis added). In appropriate cases, the PHA *may* permit continued occupancy by remaining family members and may impose a condition that family members who engage in the proscribed activity will not reside in the unit. 24 C.F.R. § 966.4(1)(5)(vii)(C) (2001) (emphasis added).

[45] 42 U.S.C. § 13661(a), 24 C.F.R. § 960.204(a)(i) for public housing, and 24 C.F.R. § 982.553(a)(1) (2001) for Section 8. Congress shortened the ban from five years to three years, but Section 8 regulations maintain a five-year bar on readmission if any member of the family is evicted for any reason from federal subsidized housing. 24 C.F.R. § 982.552(c)(1)(ii).

For families subject to the ban in jurisdictions where the waiting lists are closed or full, a three-year ban on readmission may actually mean an extended, or lifetime exclusion.[47] Even families evicted for non-drug related criminal activity will have difficulty reentering subsidized housing, since each year the overall stock of subsidized housing decreases.

Some jurisdictions have local admissions preferences on their waiting lists for emergency cases, including homeless families and victims of domestic violence. In many jurisdictions, fitting into a preference category is the *only* way to receive subsidized housing in a reasonable amount of time. Even in these cases, however, a PHA can strip an applicant of her preference status if she was evicted from subsidized housing in the previous three years for drug-related criminal activity.[48] The ultimate irony is that the PHAs create preference categories due to local emergency needs. While PHAs recognize that subsidized housing is essential for families undergoing hardships, applicants stigmatized by drug-related evictions lose their emergency status, despite their extraordinary misfortune.

## Policy Recommendations to Improve Access to Decent Shelter for Families with Criminal Records

In order to avoid unfairly precluding ex-offenders from admission or evicting innocent family members, it is imperative that the following changes be made:

- Congress should amend the U.S. Housing Act and supersede its accompanying regulations to include language requiring PHAs to evaluate evictions and admissions on a case-by-case basis, to look to mitigating circumstances, and to fully weigh the consequences of a loss of subsidized housing for the family.
- Congress should change the statute to reflect the Senate's original legislative intent to include knowledge, fault, or foreseeability requirements before a housing authority can proceed with an eviction.
- Congress should supply sufficient funding to substantially increase the stock of subsidized housing so that parents reentering the community after their incarceration can have access to subsidized housing to begin rebuilding their lives.
- For families with children, PHAs should use the "best interest of the child" standard when determining whether to grant admission to an ex-offender or evict families based on criminal activity.[49]
- PHAs should be encouraged to fully consider rehabilitation and other mitigating factors in making decisions about evictions and about readmission of families which include an ex-offender or where an allegation of criminal activity has been made.

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[46] 42 U.S.C. § 13661(a) (1998). See Section 8 regulations at 24 C.F.R. § 982.553(a)(1)(i) and 24 C.F.R. § 960.204(a)(i).

[47] In 1999, the average wait throughout the country for admission into public housing was 11 months. For the largest metropolitan housing authorities, the average wait was 33 months; however, some jurisdictions had waits greater than 10 years. NLIHC 2001 report, *supra* note 7.

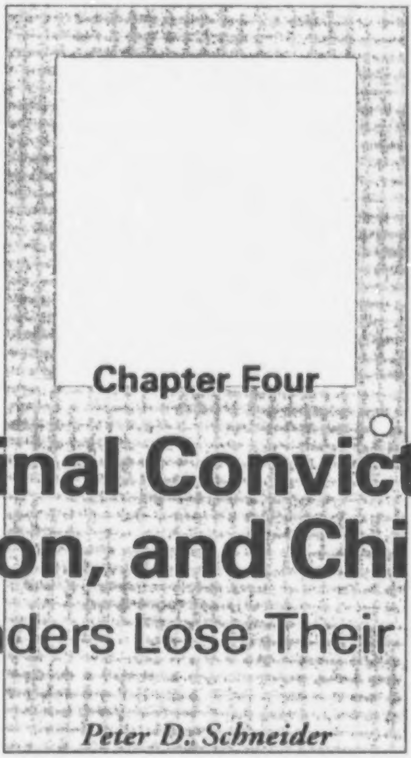
[48] *See* Legislative History S. Rep. No. 101-316 at 180 (1990). Philadelphia Housing Authority Section 8 Administrative Plan, at part 2-5.

[49] Barbara Sard, Center for Budget and Policy Priorities, *Memorandum re: Housing Proposals Related to TANF Reauthorization and Support for Working Families* (Jan. 18, 2002).

## Conclusion

The consequences of the one-strike rule are severe. Ex-offenders are denied admission to subsidized housing for criminal records that are, in many cases, minor and decades old. Many PHAs are evicting whole tenant families without assessing the potential harm to the families or the true danger posed by the person whose conduct is at issue. Families are separated when tenants have to exclude family members from the household in order to maintain their tenancy. Those banned family members may not even have been arrested for committing a crime. Little more than an allegation is needed to put tenants in a position of choosing to exile their family members rather than face homelessness. Still, the decision to exclude a family member lies within the discretion of the PHA. Instead of banning one family member, it could decide to evict the entire family.

By the nature of the barriers they face, many ex-offenders are part of the fabric of low-income communities throughout America. Yet ex-offenders are denied admission to subsidized housing even if they have paid their dues and are trying to turn their lives around. The unavailability of important stepping-stones such as subsidized housing creates more obstacles to their success. These barriers are not only unjust but also increase the likelihood of recidivism and persistent family poverty.



## Chapter Four

# Criminal Convictions, Incarceration, and Child Welfare:

## Ex-Offenders Lose Their Children

*Peter D. Schneider*

## Introduction

William B.[1] is the devoted father of a three-year-old son named Michael. As a result of a four-year-old conviction for an unrelated nonviolent criminal offense, he may lose his son forever.

When he was 22, William and some friends held a nude photo session with some young women. One of these women turned out to be 17 years old, not 19 as she had said, and William and his friends were arrested. William was jailed briefly before he was able to make bail. After pleading guilty to a misdemeanor charge, he was sentenced to five years probation, and, in the aftermath of the arrest and conviction, he settled down, moved in with his girlfriend, and began to raise a family. He got a job in a restaurant, where he has been a steady worker and has been promoted several times.

Four years after William's conviction, Michael was taken to the hospital with a head injury. William was not home at the time the injury occurred. The doctors thought the injury was suspicious and called in a report of suspected abuse to the Department of Human Services (DHS). Michael was placed in emergency foster care.

William planned to request that his son be returned home at the first court hearing after Michael was placed. He had made preparations to rent his own home and raise Michael there if the suspicions that Michael's mother had abused him could not be resolved. But the child advocate charged with representing

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[1] Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

> Michael's interests would not agree. He confronted William with his criminal record, arguing that his conviction "for a sex crime" made him an unfit father, and insisted that William only be allowed supervised visitation with Michael.
>
> Under strong pressure from the child advocate and the judge, William agreed to let his son remain temporarily in foster care. But despite William's active participation in an intensive parenting skills program and his cooperation with all that has been asked of him, he has been given no assurance that his son will be allowed to return home any time soon. Michael has now been in foster care for six months. If Michael remains in foster care beyond a year, DHS will be pressured to file a petition seeking to terminate William's parental rights and place Michael for adoption.

William's situation is not exceptional. Any parent who goes to prison, even for a short time, faces the grave risk of losing his or her children forever. Many parents will leave prison having served their time but facing a far worse sentence: the imminent loss of all rights as parents and all contact with their children. Many other parents will have lost their parental rights before their release.

Conviction of a crime or incarceration does not mean that a parent cannot continue a loving, committed relationship with his or her child. As one court has noted, "While 'use a gun, go to prison' may well be an appropriate legal maxim, 'go to prison, lose your child' is not."[2] Yet because of overly broad and inflexible laws, and the lack of sufficient attention to families caught up in the child welfare system, this is what all too frequently occurs. To protect their parental rights, incarcerated parents must work consistently, and against difficult barriers, both while in prison and afterwards. Laws and policies must change to allow incarcerated parents to be able to maintain their ties to their children, and so that their children will not forever lose the opportunity to know and have loving relationships with their parents.

Because of growing rates of incarceration and the trend to impose longer sentences, increasing numbers of parents face these issues. A majority of prisoners are parents of minor children, and a large percentage of incarcerated parents had custody of their children before going into prison.[3] Over 85 percent of incarcerated mothers intend to resume care of their children after their release.[4] In the words of one commentator:

> [P]articularly with respect to incarcerated mothers, imprisonment of a parent disrupts intact, viable families. The overwhelming majority of incarcerated mothers were active parents to their children prior to their incarceration and intend to continue in that role after their release. The time of parental confinement must therefore be viewed as an interlude, during which the parental ties must be nurtured and supported so that, to the greatest extent possible, the parent-child relationship is as strong after the parent's release as it was before.[5]

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[2] *In re Brittany S.*, 17 Cal. App. 4th 1399, 1402 (Cal. Ct. App. 1993), *rev. den.* 1993 Cal. LEXIS 6444 (1993).

[3] A Department of Justice study found, based on 1997 data, that 65.3 percent of women in state prison and 58.8 percent of women in federal prison had children under 18 years of age, as did 54.7 percent of men in state prison and 63.4 percent of men in federal prison. Christopher J. Mumola, *Special Report: Incarcerated Parents and Their Children* 2, table 1 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2000) (hereinafter "Mumola"). The study further showed that of incarcerated parents of minor children, 64.3 percent of mothers in state prison and 84 percent of mothers in federal prison had lived with their children at the time they entered prison, as had 43.8 percent of fathers in state prison and 55.2 percent of fathers in federal prison. *Id.* at 3, table 4.

[4] Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. Fam. Law 757, 759 (1991-92) (hereinafter "Genty"), citing statistics from U.S. Dept. of Justice, Bureau of Justice Statistics, *Special Report, Women in Prison* (table 13). Philip Genty is Clinical Professor of Law and Director of the Prisoners and Families Clinic at Columbia Law School. His body of scholarship on issues concerning incarcerated parents, including *Protecting the Parental Rights of Incarcerated Mothers Whose Children Are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 Fordham Urban L.J. 1 (1989) and *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 Clinical L.Rev. 273 (2000), deeply informs this chapter.

[5] *Id.*

This chapter addresses the ways in which child welfare law and policy seriously harm families in which a parent has been convicted of a crime. For many parents, the consequences of their conviction will continue well after they have completed their sentence and paid their debt to society. Because a parent's ability to preserve parental rights after release can be critically affected by decisions made and actions taken while the parent is still incarcerated, this chapter addresses the ways in which the law affects parents during the period of incarceration as well as after release.

Of course, children as well as parents are affected by the dissolution of their families. Many children in foster care, especially older children, value their relationships with their parents and "[derive] considerable strength" from them.[6] It is important to these children that the relationship be sustained wherever possible. "Legally severing these children's ties with their parents will not erase their emotional connection, nor will adoption make their biological parents disappear from their hearts and minds," noted one commentator.[7]

The importance to a child of maintaining ties with an incarcerated parent was movingly described in an article in the online magazine *Salon.com*. The writer spoke with Jundid, a 17-year-old boy whose mother was incarcerated for ten years, beginning when Jundid was three years old:

> Growing up without his mother in the house, Jundid says, was hard. "Everything that a person takes for granted, I missed so much. Whether it was cooking breakfast in the morning. Having a homemade sandwich instead of a bought lunch. Or just being able to say, 'Let me go home and ask my mom.'"
>
> But Jundid is not convinced that severing his legal tie to his mother in the name of "permanency" would have healed these wounds. Visits with his mother, he says, anchored him throughout his childhood. "We made the most of each visit that we had. And my mom was very special about trying to give time to each child. Like for my sister, she would sit there and braid her hair while she had her little private time to talk to her. I remember she used to teach me karate. I'd show her my muscles, even though I didn't have any. But just me being relaxed and having fun with my mother is what I remember most.
>
> "I couldn't even begin to express to you in words," he continues solemnly, "how fulfilling that was to my soul to give my mother a hug. For her to give me a kiss. For me to sit on her lap. And for me to not do that because of what someone else thinks — I would have felt very empty then, as a child, and maybe as well now."[8]

## Background: The Child Welfare System

Although criminal conviction and incarceration is often thought of as the ultimate act of state authority over an individual, state action in the child welfare context may actually be more invasive and painful. As one commentator has written, "What parent would not rather undergo a few days of imprisonment than be denied the right to ever see her child again?"[9] As the Supreme Court has stated:

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[6] Malcolm Bush and Andrew C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, in 27 Social Work 309, 310 (1982), cited in Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002) (hereinafter "Roberts"), at 160.

[7] Roberts, *supra*, at 160. The phrase "these children" refers specifically to a study of children in foster care between the ages of *nine* and 18, a majority of whom stated that they did not want to be adopted.

[8] Nell Bernstein, *Terminating Motherhood: How the Drug War Has Stamped an Entire Class of Parents as Permanently Unfit*, Salon.com, Oct. 25, 2000, http://www.salon.com/mwt/feature/2000/10/25/drug_families/index.html.

[9] Amy Sinden, *Why Won't Mom Cooperate? A Critique of Informality in Child Welfare Proceedings*, 11 Yale J.L. & Feminism 339, 360 (1999).

> The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious ... than property rights." "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.[10]

Where there are allegations that a child is neglected or abused, the state is given the power to intervene in the lives of families, remove children from their families, and, at its most extreme, involuntarily terminate parents' rights to their children and place the children for adoption — denying the parents any rights to regain custody, care for, visit, or have contact of any kind with their children. Where the state intervenes in this way, the consequences can be especially severe where a parent is incarcerated or has a criminal record. A problem that for other families could lead to a limited period of social service intervention or a brief child placement in foster care, could, where a parent is or has been incarcerated, lead to the permanent and irrevocable loss of all parental rights.

State child welfare intervention comes about for a variety of reasons. The largest numbers of child welfare cases involve not child abuse, but child neglect.[11] Cases vary in severity, and only a small number involve the serious, intentionally caused injuries that are suggested in the public's mind by the term "child abuse." In the words of a New York judge:

> In Family Court, cases of depraved, intentional child abuse are not routine. The bulk of the abuse and neglect cases come about because of universal human afflictions: alcoholism and drug abuse, domestic anger and strife, mental illness.[12]

Moreover, much that is termed "neglect" is actually a manifestation of poverty. As one commentator has noted:

> The association is particularly strong for poverty and neglect. Children may be removed for poverty alone. One Illinois study found that almost ten percent of children were removed because of "environmental neglect," which is broadly defined as a lack of adequate food, shelter, or clothing rather than any deliberate actions on the part of the parent; and another twelve percent were removed for lack of supervision. These are resource problems, not the problems of abusive or neglectful parents.[13]

According to another commentator:

> This is not to minimize the harms to children resulting from neglect. Neglect can kill children, and the totality of its impact on the nation's children may be greater than that of abuse. But the huge role of neglect in the child welfare system is a far cry from the public perception of the problem of child maltreatment — as mainly extreme physical abuse — and has much more to do with poverty than the public is willing to acknowledge. This does not mean that we should do nothing about it. It means that we must approach child protection in a different way.[14]

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[10] *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted).

[11] *See* Rebekah L. Dorman *et al.*, *Planning, Funding, & Implementing a Child Abuse Prevention Program* 8 (Child Welfare League of America, 1999) (of all reported child protective services cases, 38 percent involve physical or sexual abuse, while 52 percent involve neglect; these percentages include some cases where both neglect and abuse are present).

[12] Jody Adams, *A Daily Disaster for Children*, N.Y. Times, Feb. 19, 2001, at A15, col. 1.

[13] Naomi R. Cahn, *Symposium: The Implications of Welfare Reform for Children: Welfare Reform and the Juvenile Courts: Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 Ohio St. L.R. 1189, 1198-99 (1999).

[14] Roberts, *supra* note 6, at 34.

The child welfare agencies that are charged with helping troubled families and protecting children are frequently severely troubled themselves.[15] They are characterized by heavy caseloads, inexperienced and ill-paid social work staff that turns over rapidly, and a lack of resources for the delivery of effective services to families. Child advocates, charged with representing individual children's interests in court, face similar constraints. The family courts that adjudicate child welfare cases also are burdened with high caseloads, resulting in extremely brief hearings, cursory fact-finding, and a tendency to automatically adopt the findings and recommendations of the child welfare agency, whatever they may be.

Without the ability to devote sufficient individual attention to each case, the child welfare system frequently fails to distinguish cases in which children's protection requires removal from the home from those in which it does not. Jaded to the trauma of placement and driven by the fear that a "wrong" decision may wind up in the headlines, judges are often tempted to place children in foster care on only the slightest of justifications, notwithstanding Constitutional mandates that prohibit placement where there is no clear and convincing evidence that children are at risk. Because they have inadequate time to adequately assess the facts of a case, judges often give virtual veto power to caseworkers or child advocates, who themselves frequently lack the time or inclination to do a thorough investigation before recommending foster care placement or blocking reunification.[16] For ex-offenders, who are already the subject of much societal prejudice, and for incarcerated parents, who face special practical and logistical difficulties in resolving whatever problems have been identified by the child welfare system, the consequences can be especially severe.

These problems have a disparate impact on African-Americans. Studies have shown that African-American children are placed in foster care at twice the rate of white children, and that once in foster care they remain there longer.[17] Where foster care placement is related to a parent's incarceration, this disparity is compounded by the fact that African-Americans, particularly African-American men, are incarcerated at much higher rates than the general population.[18]

## Incarcerated Parents' First Contacts With the Child Welfare System

According to Department of Justice statistics, 9.6 percent of state-incarcerated mothers have minor children in foster care.[19] Incarcerated parents become involved with the child welfare system in different ways. Some parents are caring for children when they are arrested and are unable to make provisions for someone else to take over the children's care. This can happen as the result of even the briefest of incarcerations:

> Malika F. was a single mother of three children, ages 4, 3, and 2. The children's father saw the children on occasion but was not actively involved in their care. DHS monitored the children's care regularly because of reports that the younger two had been born with cocaine in

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[15] Cahn, *supra* note 13, at 1203, 1214.

[16] The failure to thoroughly investigate or evaluate the situation can also have the opposite result, a failure to remove a child in a situation where placement is called for, or a decision to reunify a child inappropriately or prematurely. Just as child welfare workers are tempted by their overwhelming caseloads to move children to foster care because it can be easier to do so than to supervise them in their homes, so too are they likely to screen out some cases altogether.

[17] Cahn, *supra* note 13, at 1212.

[18] *See* Introduction to this report at notes 30-32 and accompanying text.

[19] Mumola, *supra* note 3, at 3, table 4. The percentages are lower for fathers and for federally incarcerated mothers.

> their systems. Over several years of monitoring, there were no reports of abuse or neglect.
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> One afternoon, the father visited the home. When he criticized Malika for some of her decisions about the children, Malika responded angrily, telling him he could take the children himself if he cared so much about them. He refused, the argument intensified, and the police were called. Malika was arrested and taken to the police station. Because the father still refused to take the children and no one else was available, DHS was called and the children were placed in foster care. Malika was released later that evening without any charges filed.
>
> Malika's children remained in foster care for several days while the Department continued its investigation of the situation. Because of Malika's history of cocaine use, DHS finally refused to allow the children to return home. Although DHS acknowledged that the children had never been abused or neglected, they required that Malika complete a drug treatment program before they would even consider returning the children.

Noncustodial parents who are not themselves suspected of neglect or abuse may encounter the child welfare system when their children experience problems in the care of the custodial parent. Once the child welfare system becomes involved, the noncustodial parent's criminal record can become a major factor in the case.

> Lloyd R. was the father of an 18-month-old daughter, Brittany. DHS placed Brittany in foster care after receiving a report that the baby was being neglected while in the care of her mother, who had a history of mental illness. Lloyd stated that he wanted to step in to take over her care, but he was living as a boarder in a single room and his landlord would not allow the child to live there. DHS also had some concerns about his parenting skills, as Lloyd had never been Brittany's primary caretaker.
>
> To resolve these concerns, Lloyd successfully completed a parenting course and made plans to move into his own apartment. These plans were interrupted when he went to trial on an aggravated assault charge dating from several years earlier, a charge about which he had consistently maintained his innocence. To Lloyd's great shock, he was convicted and sentenced to a term of 15 to 30 years, to be served at a prison hundreds of miles away. He has appealed his conviction, but after one year in prison, the appellate court has not even scheduled the case for briefing. In the meantime, Brittany remains in foster care and Lloyd struggles to stay in contact with her. DHS, concerned over the length of time Brittany has already been in foster care and with no guarantee that Lloyd will win his appeal, has petitioned the court to terminate both parents' rights and place Brittany for adoption.

In other cases, it may be someone else's criminal record — not the parent's — that has a major impact on the child and other family members:

> Maria S. is the mother of a daughter, Hannah. While Maria was extremely loving to her daughter, she seemed unable to develop appropriate parenting skills. By the time Hannah was six months old, it became evident that she was not safe in her mother's care.
>
> Faced with the need for placement, Maria identified her grandfather David S.'s former fiancée, Ellen O., as someone who could take care of Hannah. Ellen was a woman in her early fifties who worked for the city government and had raised several children of her own. Ellen agreed to take Hannah, and DHS agreed to

place Hannah in her care. The child advocate disagreed with the placement, however, pointing to Ellen's relationship with David, Hannah's grandfather, who had a long criminal record. None of David's convictions involved a crime against a child, but among other convictions were some for larceny, burglary, and assault. The most serious was a 23-year-old conviction for voluntary manslaughter that David explained was the result of a bar fight. The most recent was seven years old. After reviewing the record, the court allowed the placement, but ordered Ellen to keep David from having any contact with his granddaughter.

Hannah thrived in Ellen's care. She was developing normally, and Maria was able to visit her frequently under Ellen's supervision. The newly assigned DHS social worker was preparing to close the case when Ellen mentioned to him that David had recently been to the home. The social worker knew that there had been a stay-away order entered against David and assumed incorrectly that it had been entered because he had been the perpetrator of child abuse. Without checking further, he filed an *ex parte* request for emergency removal implying that David had abused Hannah, and the judge, also newly assigned to the case, signed it and ordered Hannah placed in foster care. After a contentious hearing three days later, even after the basis for the stay-away order was brought to light, DHS and the child advocate pressed for continued foster care placement. To Maria and Ellen's great relief, the judge allowed Hannah to return to Ellen's care.

As these examples illustrate, no matter how a parent comes into contact with the child welfare system, the consequences can be harsher and the goal of family preservation or reunification more difficult to achieve when the parent has the added burden of a criminal record.

## The Federal Legal Framework

Although child welfare policy is traditionally a state matter, and laws relating to child welfare differ significantly from state to state, several key federal statutes enacted since 1980 have greatly influenced state policies by placing conditions on the receipt of federal funds.

The Adoption Assistance and Child Welfare Act of 1980 (AACWA)[20] codified a policy of family preservation and reunification. It discouraged states from removing children from their homes unnecessarily.[21] In cases where removal was necessary, it required states to follow up with reasonable efforts to reunify children with their parents.[22]

With the passage of the Adoption and Safe Families Act of 1997 (ASFA),[23] however, federal policy shifted away from family preservation and reunification. While still requiring that children not be removed unnecessarily from their homes, ASFA made children's safety the paramount consideration in determining whether or not removal is necessary.[24] In addition, while preserving the requirement that reunification efforts be made in most cases, ASFA set forth a list of circumstances in which states need *not* work toward reunification.[25] Even more significantly, ASFA placed strict time frames on reunification efforts and encouraged states to terminate parental rights in most cases where reunification efforts are not successful within the specified time frames.[26] Another federal statute, the Child Abuse Prevention and Treatment Act (CAPTA),[27] similarly limits reunification efforts and requires states to allow for the termination of parental rights where a parent has been convicted of certain crimes against children.

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[20] Pub. L. 96-272, 94 Stat. 501, codified at 42 U.S.C §§ 620 *et seq.* and 670 *et seq.*

[21] *See* 42 U.S.C. § 672(e).

[22] 42 U.S.C. § 671(a)(15).

[23] Pub. L. 105-89, 111 Stat. 2115 (Nov. 19, 1997), codified as amendments to scattered sections of 42 U.S.C.

[24] 42 U.S.C. § 671(a)(15)(A).

[25] 42 U.S.C. § 671(a)(15)(D).

These federal statutes require states to pass implementing legislation as a condition of eligibility for federal funding of foster care and adoption assistance and the state child protective services systems.[28] States are allowed considerable discretion, however, in shaping their implementing legislation, and thus state law remains far from uniform. As applied to incarcerated or ex-offender parents, some states' laws are far harsher than others.

## Adoption Assistance and Child Welfare Act (AACWA)

### 1. The "reasonable efforts" requirement.

The Adoption Assistance and Child Welfare Act of 1980[29] has been described as "the most significant legislation in the history of child welfare."[30] It represented a federal response to findings that large numbers of children had been unnecessarily removed from their homes and placed in foster care, often for years, in cases where efforts to address a family's problems might well have prevented placement and preserved the family. As a condition of federal foster care and adoption assistance funding, the Act required states to ensure, both at the time of a child's removal from the home and at regular reviews during the course of placement, that placement was in fact necessary. It did so through the requirement that states make reasonable efforts to preserve or reunify a family.[31] Though the reasonable efforts requirement has been found not to be directly enforceable by parents,[32] it has nonetheless dramatically affected state child welfare policy, by forcing states to work to preserve or reunify troubled families.

Despite modification by ASFA, the reasonable efforts requirement still applies in the vast majority of cases.[33] Most parents, including most incarcerated parents and ex-offenders, may still insist that a state make reasonable efforts to prevent or eliminate the need for a child to be placed in foster care, and if a child must be placed, that the state make reasonable efforts to allow a child to return safely home.

### 2. Parental incarceration can require the provision of additional services in order to overcome practical obstacles and preserve the parent-child relationship.

Unfortunately, states' reasonable efforts are often sorely lacking when the parent is incarcerated. Only a few states expressly provide for specific reunification services for incarcerated parents. California's provision is the most far-reaching, requiring services such as collect telephone calls, transportation, and visitation (see Appendix A).[34] This provision has been key in requiring child

[26] 42 U.S.C. § 675(5)(E).

[27] 42 U.S.C. § 5101 *et seq.*, *amended by* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. 104-235, 110 Stat. 3063 (Oct. 3, 1996).

[28] States that do not seek the relevant federal funding are not bound by the federal requirements.

[29] Pub. L. 96-272, 94 Stat. 501, codified at 42 U.S.C §§ 620 *et seq.* and 670 *et seq.*

[30] Richard Gelles, *The Book of David* 93 (1996).

[31] The statute provides: "[I]n each case, reasonable efforts will be made (A) prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a)(15) (1980) (amended by ASFA, 1997).

[32] *Suter v. Artist M.*, 503 U.S. 347 (1992). *But c.f.* 42 U.S.C. § 1320a-2 (1994), in which Congress expressly limited the reach of the holding in *Suter*.

[33] ASFA's modifications to the reasonable efforts requirement are discussed *infra* at notes 56-64 and accompanying text.

[34] Cal. Welf. & Inst. Code § 361(e)(1).

welfare authorities to assist incarcerated parents.[35] New York also mandates services to incarcerated parents, although its provision is less comprehensive than California's (see Appendix A).[36] Most states, however, have no express requirement that reunification services be provided to incarcerated parents. Without special attention to their unique needs, incarcerated parents will face issues like those described in this letter, written by a prisoner to a legal aid office in a desperate plea for assistance:

> My name is Isaac W., prison I.D. #_________ and I am incarcerated at SCI [State Correctional Institution] ___________. I am in need of legal help. I want to take legal actions for visitation rights with my children. I also want to compel the Department of Human Services to bring my boys to see me. In order to assure compliance with the court order to the letter. I've received a number of false promises which has given use to this action.
>
> What I seek is reasonable and supported by law. All I need you to do is get me heard, get me in front of a judge. I wish to be at every hearing to assure that my position is set forth clear. I am from Philly and my children still live in Philly some where. Thanking you in advance for any help you can give me. Be it law books on the subject matter, funds or legal representation.[37]

As Isaac W.'s letter exemplifies, incarcerated parents often find it virtually impossible, due to circumstances intrinsic to their incarceration, to participate in their children's cases, maintain effective contact with their children, or comply with the objectives established for them in a family service plan. In order to avoid wherever possible the tragedy of termination of parental rights, it is incumbent on child welfare agencies to maintain contact with incarcerated parents and assist them with the attainment of achievable objectives.

A California case illustrates the barriers faced by many incarcerated parents.[38] In this case, Pamela C., the incarcerated mother of a young child, Monica C., appealed a court decision terminating her parental rights and ordering her child placed for adoption. The appellate court reversed the termination, finding that the Department of Social Services (DSS) had failed to provide reasonable reunification services. The following excerpts are taken from the appellate court decision:

> [T]he dispositional order required the DSS to provide family reunification services and approved a "Family Reunification Services Agreement" between the DSS and the mother. The agreement made no provision for visitation between the child and appellant but instead required appellant to write and call the child monthly and to send pictures of herself to the child's caretaker. In addition, appellant was directed to enroll in any programs relating to substance abuse and parenting that might be offered in prison.
>
> At the time of the disposition hearing, appellant was pursuing an application to gain entry to a mother/infant program of the Department of Corrections that would allow her to care for the child while in prison. The

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[35] In one case, the appellate court reversed an order terminating parental rights where reunification efforts had ceased after both parents were incarcerated. The Department of Social Services lost contact with the parents after having provided ten months of reunification services. Upon learning that they were incarcerated, however, "the reunification services Department provided were essentially nil." The social worker spoke only once with the mother, never spoke with the father, and "made no effort to determine the availability of any services at the detention center." The court reversed the order of termination and ordered that services be provided for the remainder of the 12-month statutory period. Significantly, the court held, contrary to the state's position, that "the 12-month statutory reunification period is not reduced simply because parents are not expected to comply or succeed." *In re Michael G.*, 63 Cal. App. 4th 700, 715-16 (4th Dist. 1998). While this case also involved issues under the federal Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912(d), the court found that the applicable state law standard was "essentially undifferentiable" from the standard required by the ICWA. *Id.* at 714.

[36] N.Y. Soc. Serv. Law § 384-b(7)(f)(5).

[37] Letter on file with author (reproduced verbatim, aside from changes to the writer's name and deletions of his prison number and location).

[38] *In re Monica C.*, 31 Cal. App. 4th 296 (1994).

> state program, operated in seven small facilities, provided beds for a total of only 94 inmates throughout the entire prison system. Accordingly, admission was subject to rigorous screening standards. In a decision dated September 10, 1992, the Department of Corrections definitively denied appellant's admission into the program.
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> • • •
>
> At a contested 12-month review hearing ... the appellant testified to her efforts to comply with the reunification plan. She wrote the child weekly through December 1992, enclosing pictures with her letters. She also made frequent collect calls for a while "but it was real hard to get them to take [her] calls." She checked out books on parenting from the prison library and attended 10 Alcoholics Anonymous meetings, although the meetings were later canceled because of "a lot of disruption...." The prison did not offer parenting classes, and it gave substance abuse classes only to prisoners nearing their release date.
>
> • • •
>
> The DSS caseworker assigned to the case, Bob Settles, testified that he had never spoken face-to-face with the appellant or met her except "just to say 'hello' in this courtroom." He made no effort to contact her while she was in local jail for a period of time in the fall of 1992. As early as April 1992, he told her that he would seek a permanent placement for the child unless she succeeded in getting into the mother/infant program. By July 1992, he had come to believe that reunification services were detrimental to the child. For her part, appellant "attempted several times" to call Settles but only reached him twice. He talked to her as if "his mind was made up."
>
> • • •
>
> [H]e knew that she did not have an opportunity to enroll in parenting or substance abuse classes, and he knew that budgetary cutbacks forced the termination of other services as of February 1993.[39]

Although in Pamela's case the termination of parental rights was reversed, in many other cases such terminations proceed. The failure to make services available to incarcerated parents can often lead inevitably to a termination of parental rights, whether while the parent is still incarcerated or soon after. To forestall this possibility, parents must make use of whatever services do exist, even if they must obtain a court order, as did Pamela, requiring that the services be provided to them.[40]

### 3. The importance of visitation during a parent's period of incarceration.

Maintaining contact with children is extremely difficult for most incarcerated parents, who are hampered by prison-imposed limitations on their communications and often are not informed of important developments in their cases. Even with access to information, incarcerated parents struggle to remain part of their children's lives. Visitation is frequently denied, whether out of a desire to spare a child the "trauma" of a prison visit, or because no one involved in the case is willing to transport the child on a long trip to a faraway prison.[41]

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[39] *Id.* at 300-03.

[40] Obtaining a court order will, of course, usually require aggressive legal representation.

[41] A recent article described how, in New York, despite statutory and regulatory requirements that agencies provide visitation:

> Regular visiting with incarcerated parents ... rarely occurs. Some of the barriers to regular visiting are logistical. For example, the state's largest medium-security prison for women is more than eight hours from New York City. Some of the barriers are attitudinal. Many foster care caseworkers believe that visiting a parent in jail or prison is not good for children and simply do not bring them for visits. Because of prison-system barriers, such as lack of access to telephones and the distance of prisons from New York City, incarcerated parents cannot assert their visitation rights on their own.

Lauren Shapiro, Lynn Vogelstein, and Jennifer Light, *Family Ties: Representing Formerly Incarcerated Women with Children in Family Court*, 35 Clearinghouse Review 243, 252 (Sept.-Oct. 2001).

Some courts and state legislatures have recognized the fundamental importance of visitation and the need for the child welfare agency to arrange it. In the words of a California court, reversing a trial court decision terminating a mother's parental rights to her two-year-old daughter, "By not providing visitation, [the child welfare agency] virtually assured the erosion (and termination) of any meaningful relationship" between mother and child.[42] New York law requires that the state make "suitable arrangements for the parents to visit the child."[43] State regulations and policy provide for visits between incarcerated parents and their children at least monthly.[44] (Several states have created programs to facilitate visitation and other forms of contact between incarcerated parents and their children, and these programs are discussed later in this chapter.)[45]

In other states, the law as it currently stands is no help. A Pennsylvania court, for example, has held that even where a visit would not cause stress to a child, the state is under no obligation to transport the child to visit a parent in prison, stating that "there is a difference between the right of the parents to visitation, and the matter of who pays for the transportation and other arrangements."[46]

Even something as seemingly simple as telephone contact can be difficult for an incarcerated parent. Telephone contact with a child may be prohibited, sometimes by the prison and sometimes by the child welfare agency or the foster parent. Prisoners are typically limited to collect phone calls, but many child welfare agencies refuse to accept such calls. Foster parents are frequently unwilling to release their telephone numbers. Especially for younger children who cannot read or write, where there is infrequent visitation and no ability to remain in phone contact, the bond between parent and child may slip away. Few states have statutory provisions like California's that require the state to "maintain ... contact between the parent and child through collect telephone calls."[47]

### 4. The importance of relative placement.[48]

Informal kinship arrangements (that is, arrangements made by the family without state involvement) can keep families out of the child welfare and foster care systems altogether. Ordinarily, a parent's incarceration would not even provide a basis to find a child dependent where the parent has made appropriate arrangements for the child's care.[49] Even where the child is placed by the child welfare agency rather than informally placed by the parent, a relative placement can be of immense benefit to both parent and child. This fact is recognized by families and by the law: the vast majority of children of incarcerated mothers reside with a grandparent or other relative,[50] and since 1996, federal law has sought to promote relative placement.[51]

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[42] *In re Brittany S.*, 17 Cal. App. 4th 1399, 1407 (1993).

[43] N.Y. Soc. Serv. Law § 384-b(7)(f)(2). The statute further provides that "except that with respect to an incarcerated parent, arrangements for the incarcerated parent to visit the child outside the correctional facility shall not be required unless reasonably feasible and in the best interest of the child." *Id.*

[44] Genty, *supra* note 4, at 829 n. 207, citing 18 N.Y.C.R.R. § 430.12(d)(1)(i) and directive of the N.Y. State Dept. of Social Services 85 ADM-42, Sept. 3, 1985.

[45] See *infra* notes 112-121 and accompanying text.

[46] *In re C.J.*, 1999 Pa. Super. 94, 96-97 (1999). The court stated, "Had [the parents] not chosen to commit the criminal offense[s] they did, their ability to visit would be governed by different circumstances."

[47] Cal. Welf. & Inst. Code § 361.5(e)(1)(A). But note that even in California, this requirement is limited to the first twelve, or sometimes six, months after placement. *See* discussion of California's reunification requirements, *infra*.

[48] In this discussion, the terms "relative" and "kin" are used interchangeably. In Pennsylvania, a "kinship care giver" is defined broadly as someone who is related to the child through blood or marriage, a child's recognized godparent, a member of the same tribe or clan as the child, or someone who has a significant and positive relationship with the child or the child's family. *See* Pennsylvania Dept. of Public Welfare, *Children Youth and Families Bulletin* 00-97-06, Kinship Care Guidelines 2 (1997).

[49] *See, e.g.*, Cal. Welf. & Inst. Code § 300(g), providing that a child may be adjudicated dependent where "the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor." In a case applying this provision, an adjudication of dependency was reversed where DDS took a child from his mother's custody due to neglect and placed him with his paternal grandmother, without first giving the incarcerated father the opportunity to make arrangements for his care. *In re Aaron S.*, 228 Cal. App. 3d 202 (1991).

For the child, a placement with a relative or kin can ease the trauma of placement because the caregiver is usually someone well known to the child. Moreover, relative or kinship placement can ensure continuity with other significant relationships. The child often can remain in her community and can continue to see siblings, other relatives, and friends — relationships that may be sacrificed when children are placed in foster care with strangers. Also, relatives are typically more motivated than unrelated foster parents to act affirmatively to maintain parent-child relationships by facilitating visits and other forms of contact. Even if parental rights ultimately are terminated and the relative caregiver adopts the child, the ongoing family relationship may allow the child to maintain some form of relationship and contact with the natural parent.

## Adoption and Safe Families Act (ASFA)

By emphasizing considerations of "safety" and "permanency" over family preservation and reunification, ASFA has significantly altered child welfare policy in the United States.[52] Many of the policy changes resulting from ASFA fall especially hard on parents who have been convicted of a crime. While ASFA provisions addressed specifically to parents convicted of certain crimes will affect only a relatively small number of parents, a far greater number will be caught up in the interplay between ASFA's general provisions and the fact of their incarceration. In particular, as a result of the shortened time frames established by ASFA for reaching permanency decisions, parents who are incarcerated may find as they near release that they have little or no time left to resolve underlying parenting issues and prove that they are capable of resuming the care of their children.[53] Satisfying reunification objectives — finding a place to live, finishing school, getting a job, accessing mental health or drug treatment, or obtaining public benefits — can be especially difficult for ex-offenders, who face the cumulative effect of the multiple barriers described elsewhere in this report.

It must be noted that few of ASFA's negative implications are actually mandated by the statute. As written, ASFA allows state courts and child welfare agencies considerable discretion to consider the specific circumstances of each individual case before them. As applied, however, the discretion permitted by the statute frequently is not exercised, time deadlines are enforced without regard to the exceptions permitted by the statute, and "permanency" is redefined as "adoption," regardless of whether adoption is in a particular child's best interest.[54] As one critic of ASFA has noted:

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[50] Mumola, *supra* note 3, at 3, table 4. According to this data, 52.9 percent of state-incarcerated mothers reported that their children were living with grandparents and 25.7 percent with other relatives. For mothers incarcerated in federal prison, the figures were 44.9 percent and 33.9 percent, respectively. The figures for incarcerated fathers were far lower, as most of their children were living with the children's mothers. There may be duplication among the placement categories because some parents had multiple children living with different caregivers.

[51] A state is required in its foster care plan to "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19). Unfortunately, this provision is without teeth, as states are only required to "consider" giving such preference. Nonetheless, a preference for relative or kinship placement is written into some states' laws. *See, e.g.,* Ark. Stat. Ann. § 9-9-102(a) (Appendix D).

[52] The equation of termination of parental rights with "permanency," an equation that has been encouraged by the enactment of ASFA, can cause serious harm in individual cases. Many children, particularly older children, children with special needs, and children of color, are unlikely to be adopted, even after termination of parental rights. "Permanency" can be a false illusion at best for a child whose relationship with his or her parents is severed, where there is no realistic prospect of a new relationship to take its place. For a general discussion of ASFA, criticizing its disproportionate focus on permanency and noting that "the efforts towards permanency planning may lead to unfair and untimely disruptions of [children's] relationships with their parents," see Cahn, *supra* note 13, at 1191.

[53] Once children have been removed, even for a short period, it becomes increasingly difficult to have them returned home. The legal burden that a parent must meet to obtain an order to return a child home is typically greater than the burden to prevent foster care placement in the first place. For example, under Pennsylvania law, a child may not be removed from the home unless removal is "clearly necessary." *Interest of Paul S.*, 552 A.2d 288 (Pa. Super. 1988). Once removed, however, a decision as to whether to return a child from foster care is based on the less stringent standard of child's "best interests," although the determination of the child's interests is to be weighted in favor of return. *In re Desiree B.*, 450 A.2d 1003 (Pa. Super. 1982). The author has observed in his practice, moreover, that courts frequently fail to apply even this lower standard, and that parents seeking reunification with their children are frequently measured against unreasonably high expectations that any parent would have difficulty satisfying.

> [T]here are many times when it serves children best to retain their bonds with their parents, and it is a good thing that ASFA allows caseworkers and judges to take children's interest in family relationships into account. The danger is not that caseworkers opposed to terminating parental rights will exploit this provision. The danger is that the law's other incentives to free children for adoption will overwhelm consideration of their family bonds.[55]

### 1. Exceptions to the requirement to make reasonable efforts.

ASFA limits the circumstances in which a state is required to make reasonable efforts to preserve or reunify a family. ASFA provides that preservation or reunification services are not required, though neither are they prohibited, where a parent has committed certain specified crimes against a child, where the parent previously has had parental rights to another child terminated, or where the parent has subjected the child to any "aggravated circumstances" that state law might specify.[56] ASFA still allows states to grant judicial discretion to require the provision of reunification services in any individual case, even where one of the above situations applies. But ASFA does not require states to grant this discretion, nor does it provide any tools for a parent to use to require a judge to exercise it.

For the most serious of these crimes and aggravated circumstances, ASFA's policy is clearly justified; there are some situations where it is self-evident that reasonable efforts should not be required.[57] The breadth of the ASFA exceptions is troubling, however, as it allows each state to define however it chooses those "aggravated circumstances" in which reasonable efforts will not be required.[58] While the examples listed in ASFA may all be serious enough to warrant the elimination of the reasonable efforts requirement — these circumstances "include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse" — states are not limited by these examples, and individual states have included circumstances far less severe. For example, under California law, reasonable efforts are not required where a parent has been convicted of any violent felony.[59]

Even in other states, where a parent's crime must be extremely serious to constitute an aggravated circumstance, the provision's reach can be overly broad. For example, Pennsylvania includes in its list of aggravated circumstances felony aggravated assault and misdemeanor indecent assault where the victim was a child.[60] Notably, the victim may be any child, not just a child of the parent, and there is no limitation on the time of the conviction. The crime could have taken place years, or even decades, before. An individual who as a young man committed an aggravated assault against a 17-year-old, but then served his time, turned his life around, and had a family, could find his conviction coming back to haunt him if, later in life, he comes in contact with the child welfare system. In such a case, his conviction could be cited as an aggravated circumstance and used to justify a refusal to provide reunification services. While Pennsylvania law, in keeping with ASFA, gives judges the discretion to require reunification services in any given case,[61] there are no standards set for the exercise of that discretion and no grounds provided for a parent to contest the denial of reunification services.

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[54] This statement is based on the author's interactions in the course of his practice with child welfare agency workers and attorneys, child advocates, court officials, and judges. While these views are far from universal, they are commonly held. It remains to be seen whether the systems employed to monitor and measure state and local compliance with ASFA will be structured to recognize, or on the contrary to penalize, the appropriate exercise of discretion.

[55] Roberts, *supra* note 6, at 116.

[56] 42 U.S.C. § 671(a)(15)(D). Where one of these factors applies, although federal law does not mandate reasonable efforts, a state may still make a determination on a case-by-case basis as to the appropriateness of making such efforts.

[57] For example, reasonable efforts may not be required where the parent has committed murder or voluntary manslaughter of another of the parent's children, or has aided, abetted, conspired, or solicited to commit such a crime. 42 U.S.C. § 671(a)(15)(D). In addition, reasonable efforts may not be required where a parent has "committed a felony assault that results in serious bodily injury to the child or another child of the parent." 42 U.S.C. § 671(a)(15)(D)(ii)(I), (II), and (III).

[58] 42 U.S.C. § 671(a)(15)(D)(i).

[59] Cal. Welf. & Inst. Code § 361.5(b)(11).

[60] 42 Pa. C.S.A. § 6302, definition (3) of "aggravated circumstances."

Under ASFA, severe consequences attach to a family where a court determines that reasonable efforts need not be made. Within 30 days of the decision not to make reasonable efforts, the court must schedule a "permanency" hearing[62] and the state must make "reasonable efforts ... to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child."[63] This "permanent placement" is likely in many cases to be a pre-adoptive home, especially if the child is not placed with a relative. Thus, where reasonable efforts are not required, a child can be placed on a very fast track toward adoption, and a parent may have only a very limited ability to prevent the loss of all parental rights.

In addition, ASFA provides that the involuntary termination of parental rights to one child is itself an aggravated circumstance with regard to other children of the same parent.[64] If any children of the parent later enter the child welfare system, reasonable efforts are not required, and these other children too can be put on a fast track to termination of parental rights. While there are certainly circumstances where this would be appropriate, there are many others where it would not be. A parent who lost parental rights to a child many years ago, but who has made a new life since, could face immediate loss of parental rights to another child who somehow became involved with the child welfare system.

While ASFA does not mandate such unjust results — it clearly allows each case to be examined individually — the overburdened child welfare system frequently lacks the resources to provide such individual attention. Without a drastic redeployment of resources to the child welfare system, allowing lower caseloads and better training and education of child welfare professionals (from social workers to attorneys to judges), these results are virtually inevitable.

**2. Stringent time frames for reunification.**

Several years before the enactment of ASFA, a commentator pointed out that:

> [T]he statutes of several states, while not addressing parental incarceration, are structured in a way that they could have [that effect]; that is, they could result in a *per se* finding of parental unfitness for prisoners who are serving extended prison terms. These statutes provide that children can generally remain in foster care only for a specified maximum period and that parental rights can be terminated when the duration of a foster care placement exceeds that maximum.[65]

The stringent permanency time frames enacted as part of ASFA can effectively extend this problem to every jurisdiction unless child welfare agencies and courts make it a practice to exercise the discretion that ASFA allows.

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[61] 42 Pa. C.S.A. § 6351(e)(2).

[62] 42 U.S.C. § 671(a)(15)(E)(i).

[63] 42 U.S.C. § 671(a)(15)(E)(ii).

[64] 42 U.S.C. § 671(a)(15)(D)(iii). This provision effectively penalizes a parent for asserting the right to oppose a parental rights termination, since a voluntary termination does not create an aggravated circumstance.

[65] Genty, *supra* note 4, at 815.

Even where reasonable efforts are still required, ASFA imposes severe limits on how long a parent may be given to meet the goals necessary for reunification. ASFA requires that a court conduct a hearing no later than 12 months after a child enters foster care, to "determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption," "referred for legal guardianship," or "placed in another planned living arrangement."[66]

Where the permanency plan is adoption, the next step typically will be the filing of a petition to terminate parental rights. ASFA requires that unless the state decides to apply one of three significant exceptions, then whenever a child has been in foster care for 15 of the most recent 22 months, the state must file a petition to terminate parental rights and concurrently to seek an adoptive family for the child.[67] The three exceptions are where the child is being cared for by a relative, where the state has documented in the case plan a compelling reason not to file for termination, or where reasonable efforts to return the child home were required but necessary reunification services were not provided.[68] These exceptions, especially the first, have direct bearing on the rights of incarcerated parents.[69]

The requirement to file a termination petition has a special impact on incarcerated parents whose children are in foster care.[70] For many of these parents, time will simply run out before they can complete their sentences. According to recent data, women incarcerated in state prison serve a mean term of 49 months and men a mean term of 82 months.[71] With only 12 months within which reunification must either take place or be imminent, if the time deadlines in ASFA are applied strictly, parents who are serving longer sentences will never be given the opportunity to reunify with their children. Unless states make generous use of the statutory exceptions to the requirement to file a termination petition, countless families will be permanently broken up.[72]

Unfortunately, some states have taken the opposite approach, making a child's length of stay in foster care for the period set forth in ASFA a ground for termination in and of itself. In Illinois, for example, the amendments to the Adoption Act implementing ASFA also added a new provision creating a presumption in favor of termination of parental rights whenever a child has been in foster care for 15 months out of a 22-month period.[73] Noting that this statute could require termination where a portion of the 15 months had passed without fault of the parent, such as in the case of a court delay or because of treatment program waiting lists, the Illinois Supreme Court recently held this provision unconstitutional as a deprivation of substantive due process.[74]

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[66] 42 U.S.C. § 675(5)(C).

[67] 42 U.S.C. § 675(5)(E). The requirement to file a termination petition also applies, even if a child has not been in placement for 15 months, in situations where an infant is abandoned or where it is determined that a parent has committed certain crimes against the child or another child of the parent. *Id.*

[68] 42 U.S.C. § 675(5)(E)(i), (ii), and (iii). *See also* the federal regulations implementing this provision of ASFA at 45 C.F.R. § 1356.21(i)(2). ASFA does not require a state to include in its statutory scheme any specific grounds for termination of parental rights. In any individual case, the absence of a state-law ground for termination of parental rights is recognized as a compelling reason not to file a petition for termination. *See* C.F.R. § 1356.21(i)(2)(ii)(B) and comment, 65 F.R. 4020, 4061 (Jan. 25, 2000).

[69] Approximately 20 percent of incarcerated parents reported that their children were living with grandparents and other relatives, as opposed to two percent whose children were in foster or institutional care. Mumola, *supra* note 3, at 4.

[70] It also affects children who are placed with relatives. When a child's placement with a relative caregiver involves the intervention of the child welfare system, and where the child's case remains open in court after 15 months of placement, both of which conditions are usually necessary in order for the relative to receive financial assistance as a kinship caregiver, ASFA requires that a termination petition be filed unless the relative placement exception is applied specifically to the individual case.

[71] Mumola, *supra* note 3, at 6, table 8.

[72] One recently noted unintended consequence of ASFA's fast track toward termination is that some mothers in New York serving time for drug offenses have placed their newborn babies "informally," without the involvement of child welfare authorities, in a congregate care setting in order to avoid possibly losing them to the 12-month permanency clock. Apart from the detriment to a child of being raised in congregate care instead of in a family setting, some mothers have complained that the congregate care facility failed to work with them on reunification, to arrange for visits, or to provide information about their children's progress. *Some Jailed Mothers Criticize Child Care at Hale House*, N.Y. Times, Apr. 21, 2001, at B1, col. 2; *Some Jailed Mothers Say Hale House Didn't Keep Promises*, N.Y. Times, Apr. 25, 2001, at B1, col. 2.

Even where time does not run out during the period of incarceration, the paucity of services in prison virtually guarantees termination for many other parents, by making it impossible for them to comply with the provisions of their family service or reunification plans. Drug treatment, individual counseling, and other mental health treatment are often unavailable in prison, as is parenting education, especially for fathers.[75] Family counseling is almost never available. Maintaining visitation or other contact with one's children may be difficult or impossible. As a result, parents often are unable for the length of their incarceration to work on the objectives that the child welfare agency or court believe are necessary in order to correct the problems that led to a child's removal from the home.

### 3. Criminal record checks of foster and adoptive parents.

Another provision of ASFA requires that a state, unless its governor or legislature expressly elect otherwise, provide for criminal records checks of all prospective foster or adoptive parents, and that it deny approval of a child's placement where the foster or adoptive parent has been convicted of certain crimes:

> [I]n any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and
>
> [I]n any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted.[76]

While this provision obviously is intended to protect children from potentially violent or dangerous foster or adoptive parents, it is drafted so broadly as to require in some cases that children be removed from capable and loving foster parents or relatives. In a case with particularly egregious facts, New York's especially stringent version of this provision was successfully challenged as an irrebuttable presumption in violation of a foster parent's right to due process.[77]

The New York case was brought by Gwendolyn Grant,[78] a 53-year-old dental assistant who had served for eight years as the kinship foster mother of her drug-addicted sister's four daughters, and who had filed petitions seeking to adopt them. In 1991, when she first applied to care for the girls, and again in 1998 when she sought to adopt them, she fully disclosed her criminal record: she had pled guilty in 1978 to reckless manslaughter as a result of an incident in which she had defended herself with a knife during a violent struggle in which her abusive boyfriend sought to choke her. The children's law guardian and the foster care placement agency joined in requesting that the adoption be allowed to proceed, but the statute required that the children be removed from the home.[79]

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[73] 750 I.L.C.S. § 50/1(D)(m-1). This section provides for termination of parental rights where a child has been in foster care for 15 out of 22 months unless the parent proves, by a preponderance of the evidence, that it is more likely than not that it will be in the best interests of the child to be returned to the parent within 6 months of the date on which the termination petition is filed. The 15-month time limit is to be tolled during any period for which there is a court finding that the agency failed to make reasonable efforts to reunify the child.

[74] *In re H.G.*, 197 Ill. 2d 317 (2001).

[75] Elise Zealand, *Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent-Child Relationship*, 31 Colum. J.L. & Soc. Probs. 247, 255-256 (1998) (hereinafter "Zealand") ("A random sampling of prison programs across the country shows a paucity of parenting programs available for incarcerated prisoners of both sexes.... The programs that do exist are largely devoted to mothers.") *See also* William Wesley Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me? Family Reunification for Fathers of Single Custodial Fathers in Prison — Will the Sins of Incarcerated Fathers Be Inherited By Their Children?* 75 N. Dak. L. Rev. 179 (1999).

[76] 42 U.S.C. § 671(a)(20(A)(i) and (ii).

[77] *Matter of Jonee*, 181 Misc. 2d 822, 695 N.Y.S. 2d 920 (N.Y. Fam. Ct. Kings, 1999).

[78] Gwendolyn Grant is the fictitious name by which the plaintiff was identified in court papers.

The court held that the children could not be removed without considering the family's individual circumstances:

> The irrebuttable statutory presumption in ASFA that (i) petitioner is unfit to raise her nieces and (ii) the children's best interests require their removal from the only stable home they have ever known fails to satisfy the due process requirements of the state and federal constitutions. A homicide conviction may, and usually does, render a child's custodian unfit; but that fact is beside the point. It is the inability ever to prove otherwise under ASFA that renders the statute unconstitutional. Here, all the evidence — including a series of comprehensive forensic and investigative assessments by highly qualified experts — demonstrates that petitioner has provided nothing less than expert care for the children throughout the years and that an intact family exists. In these circumstances, petitioner's conviction cannot be dispositive. Indeed, the conviction proves once again that "the only absolute in the law governing custody of children is that there are no absolutes."
>
> There is no overriding state interest for a "one size fits all" procedure that compels an outcome so obviously damaging to the children's interests. ASFA's stated purpose is to "preserve the health and safety of children in foster care and to expeditiously transition such children into suitable permanent homes." Contrary to that purpose, the procedure mandated by ASFA actually hinder[s] attainment of the ... objectives [the statute is] designed to promote.[80]

Following the successful court challenges, and in keeping with the ASFA provision authorizing states to opt out of ASFA's criminal history review provisions, New York's statute was amended to allow, in certain categories of cases, for the consideration of the individual circumstances of the case before requiring removal of a child.[81]

## Child Abuse Prevention and Treatment Act (CAPTA)

The Child Abuse Prevention and Treatment Act Amendments of 1996[82] affects only a small number of parents. This act mandates that states comply with certain requirements in order to qualify for federal funding of their child protective services systems. Under CAPTA, states are prohibited from requiring reunification, and are required to allow for termination of parental rights, where a parent has committed any of a list of serious crimes against the child in question or another child of the parent. The specified crimes are the same as those specified by ASFA.[83] Although CAPTA requires states to provide that conviction of one of these crimes be a ground for termination of parental rights, CAPTA, like ASFA, makes clear that termination is not mandatory: "[C]ase-by-case determinations of whether or not to seek termination of parental rights shall be within the sole discretion of the State."[84]

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[79] A *New York Times* article detailed other such cases, including one where a child was ordered removed from a foster parent in 1999 because of a 1966 conviction for attempted robbery. *Criticism for Law Barring Foster Parents With Past Felonies*, N.Y. Times, Feb. 27, 2000, at § 1, p. 39, col. 2.

[80] *Matter of Jonee, supra* note 77, 181 Misc. 2d 822, 828-29 (1999) (citations omitted). References in this quotation to "ASFA" are to the New York State Adoption and Safe Families Act, N.Y. Soc. Serv. Law §§ 378-a(2)(e)(1) and 378-a(2)(h) (1997) (subsequently amended 1999 and 2000; *see* note 81, *infra*), and not to the federal statute. *See also Adoption of Corey*, 184 Misc. 2d 437, 446 (1999), where the court refused to apply ASFA's irrebuttable presumption of unfitness and allowed an adoption by foster parents who were "the best thing that ever happened" to the children, finding that the foster father had been fully rehabilitated after a conviction for armed robbery 14 years earlier at age 21.

[81] *See* 1999 N.Y. Laws ch. 7, §§ 55, 58 (eff. Feb. 11, 1999) (providing that a previously approved foster parent or an adoptive parent who had been approved but had not completed the adoption process, who had been automatically rejected or whose foster child had been automatically removed pursuant to the NY-ASFA provisions, could again seek approval and to have the child returned, where return was in the child's best interest). *See also* 2000 N.Y. Laws, ch. 145, §§ 1, 20, 21 (eff. July 1, 2000) (expressly making the federal ASFA provisions relating to criminal history reviews inapplicable, and amending NY-ASFA to allow a foster or adoptive parent to demonstrate that denial of approval would cause an "unreasonable risk of harm to the physical or mental health of the child," and that approval would not "place the child's safety in jeopardy," and would be in the best interests of the child). N.Y. Soc. Serv. Law §§ 378-a(4) and (5) (2000). ASFA's state opt-out provision is found at 42 U.S.C. § 471(a)(20(B).

[82] Pub. L. 104-235, 110 Stat. 3063 (Oct. 3, 1996).

## The Effect of State Law and Policy

Except under the limited circumstances described above, neither ASFA nor CAPTA impose any requirements on when state law must allow termination of parental rights, and thus the determination of what does or does not constitute grounds for termination varies widely from state to state. While a detailed state-by-state survey of grounds for termination of parental rights is beyond the scope of this publication, some key state provisions will be discussed.[85]

Typically, termination of parental rights involves a two-part analysis: first, whether a specific state-law standard for termination of parental rights has been met, and, if so, whether severing the parent-child relationship would serve the best interests of the child. Thus where a ground for termination may be found to exist, termination typically is not automatic but may only be ordered where it serves the child's best interests. The U.S. Constitution requires the state to prove by clear and convincing evidence that a ground for termination has been satisfied.[86] State law varies as to which party has the burden of proving whether termination would serve the child's best interests, and by what standard the burden must be met.[87]

## Incarceration as a Ground for Termination of Parental Rights

### 1. Incarceration as a *per se* ground for termination.

Increasingly, as a result of the ASFA-driven preoccupation with "permanency," the mere fact of a parent's incarceration can result in the termination of parental rights, even where the underlying criminal offense is not serious or has no bearing on the parent's ability to care for a child. In a number of states, statutes provide that a parent's incarceration is in and of itself a ground for termination of parental rights.[88] For example, in Ohio it is a ground for termination ("permanent custody," in Ohio nomenclature) where:

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[83] The crimes are murder; voluntary manslaughter; aiding or abetting, attempting, conspiring, or soliciting to commit murder or voluntary manslaughter; or felony assault that results in serious bodily injury. 42 U.S.C. § 5106a(b)(2)(A)(xii) (CAPTA); *compare to* 42 U.S.C. § 671(a)(15)(D)(ii) (ASFA).

[84] 42 U.S.C. § 5106a(b)(2)(A)(xii).

[85] For a comprehensive summary of the statutory provisions of each state relating to termination of parental rights, see U.S. Department of Health and Human Services and National Clearinghouse on Child Abuse and Neglect Information, *Child Abuse and Neglect State Statutes Elements: Permanency Planning: No. 38: Termination of Parental Rights*, http://www.calib.com/nccanch/pubs/stats00/termin.pdf. *See also* Genty, *supra* note 4, which contains a detailed survey of state law as of 1991, prior to the enactment of CAPTA and ASFA.

[86] *Santosky v. Kramer*, 455 U.S. 745, 747-748 (1982).

[87] For example, Pennsylvania case law requires that the state prove by clear and convincing evidence that termination best meets the needs and welfare of the child. *In re E.M.*, 533 Pa. 115, 122, 620 A.2d 481 (1993). In other jurisdictions, however, state law provides that certain facts, if proven, create presumptions that parents then have the burden to rebut. *See, e.g.*, Idaho Code § 16-2005 (where grounds for termination are proven, there is a rebuttable presumption that termination is in the best interest of the child). In cases concerning certain Native American children, the Indian Child Welfare Act provides for a stricter burden of proof than is constitutionally mandated: termination may not be ordered in Indian child welfare cases unless there is evidence beyond a reasonable doubt that the continued custody of the child by the parent "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

[88] According to Zealand, "In at least twenty-five states, parental rights or adoption statutes have provisions that explicitly pertain to inmates." Zealand, *supra* note 75, at 260.

> [t]he parent is incarcerated at the time of filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least 18 months after the filing of the motion for permanent custody or the dispositional hearing.[89]

It is also a ground for termination in Ohio where "[t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child."[90]

In another example, Arizona law provides for termination where "the parent is deprived of civil liberties due to the conviction of a felony ... if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years."[91] Iowa provides for termination where "the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of 5 years or more."[92]

In other states, incarceration is a ground for termination when coupled with a finding that the parent has not made acceptable alternative arrangements for the child's care. In Michigan, a court may terminate parental rights where:

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[93]

In those cases where a child is already living in foster care at the time the parent is incarcerated, this Michigan provision may work much like the *per se* provisions described above, since a finding that the parent is unable to provide for the child will probably have been made when the child entered placement.

### 2. Incarceration as a contributing factor to termination of parental rights.

Other states do not consider incarceration to be a *per se* ground for termination but rather look to the circumstances of the case in determining whether termination is appropriate. In Pennsylvania, for example:

> [A] parent's absence and/or failure to support due to incarceration is not conclusive on the issue of abandonment. Nevertheless, we are not willing to completely toll a parent's responsibilities during his or her incarceration. Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child. Where the parent does not exercise reasonable firmness "in declining to yield to obstacles," his other rights may be forfeited.[94]

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[89] O.R.C. Ann. § 2151.414(E)(12).

[90] O.R.C. Ann. § 2151.414(E)(13).

[91] A.R.S. 8-533(B)(4).

[92] Iowa Code § 232.116(1)(i)(2).

[93] M.S.A. § 27.3178 (598.19b)(3)(h).

[94] *In re McCray*, 460 Pa. 210, 216-17 (1975). Despite the articulation of this standard, the court affirmed the lower court's order terminating parental rights. In what must necessarily be a fact-specific inquiry, incarcerated parents may find they have difficulty prevailing.

In Oklahoma, this case-by-case approach is required by statute.[95]

Even where the statutory grounds for termination of parental rights make no mention of parental incarceration, the limitations that incarceration places on the parent-child relationship may themselves result in termination. In a recent Pennsylvania case,[96] while reaffirming that "incarceration of a parent does not, in itself, provide sufficient grounds for termination of parental rights," the court nonetheless affirmed an order of termination where a father was arrested several times and had little contact during his periods of incarceration with his child, the child welfare agency social worker, or his child's foster parents. The court found that this course of conduct constituted a "settled intent to refuse or fail to perform parental duties," one of the grounds for termination under Pennsylvania law.

## Conviction as a Ground for Termination of Parental Rights

In many states, a parent's criminal conviction for certain crimes or categories of crimes constitutes grounds for termination of parental rights. Most states specify the serious crimes set forth in CAPTA as grounds for termination where the victim is the parent's child, and many states do so where the victim is any child.

In some states, the grounds for termination of parental rights based on a parental criminal conviction are far broader than those required by CAPTA. For example, in Vermont, parental rights may be terminated where a parent:

> has been convicted of a crime of violence or has been found by a court of competent jurisdiction to have committed an act of violence which violated a restraining or protective order, and the facts of the crime or violation indicate that the [parent] is unfit to maintain a relationship of parent and child with the minor.[97]

In Georgia, rights may be terminated due to the:

> conviction of the parent of a felony and imprisonment therefore which has a demonstrable negative effect on the quality of the parent-child relationship.[98]

Illinois allows for termination of parental rights due to "depravity," which it defines to include, among other things, a parent's conviction of three felonies where at least one of these convictions took place within 5 years of the filing of the petition seeking termination of parental rights.[99] Under this provision, two of the three convictions could have been from many years in the past, perhaps even long before the birth of the child. Even the third conviction could have been before the child was born, in the case of a young child. Effectively, this provision adds the possibility of termination of parental rights to the sentence whenever an individual is convicted of a third felony.

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[95] Oklahoma provides that parental rights may be terminated if a parent has been incarcerated and the child is not placed with a relative, but only where:

> [t]he continuation of parental rights would result in harm to the child based on consideration of the following factors, among others: the duration of incarceration and its detrimental effect on the parent/child relationship; any previous incarcerations; any history of criminal behavior, including crimes against children; the age of the child; the evidence of abuse or neglect of the child or siblings of the child by the parent; and the current relationship between the parent and the child and the manner in which the parent has exercised parental rights and duties in the past, and termination of parental rights is in the best interests of the child.

10 Okl. St. § 7006-1.1(A)(12). The statute adds that "the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of parental rights." *Id.*

[96] *Interest of C.S.*, 2000 Pa. Super. 318 (2000).

[97] 15A V.S.A. § 3-504(a)(3).

[98] O.C.G.A. § 15-11-94(b)(4)(B)(iii).

[99] 750 I.L.C.S. § 50/1(1)(D)(i). Under the Illinois scheme, a parent with such convictions may rebut the presumption of depravity.

## Child Support Obligations

While it is beyond the scope of this chapter to address the topic in detail, the complex relationship between child support obligations and the child welfare system merits a brief discussion.[100]

A child support obligation can exist as an indirect consequence of incarceration itself. If a child placed is in foster care, the state child welfare agency can make a claim for child support from one or both parents.[101] If a child is placed with a relative, the placement may still create a support obligation. A relative placement made pursuant to the state's kinship care program will be treated just like a foster placement, with a support obligation potentially accruing to the state. Where the relative cares for the child informally, even when the child welfare system is not involved at all, there can still be a support debt if, as is commonly the case, the relative seeks public assistance to help care for the child.[102]

In some states, failure to pay child support is in itself an express ground for termination of parental rights. For example, Hawaii law provides that parental rights may be terminated where a parent, "when the child is in the custody of another, has failed to provide for care and support of the child when able to do so for a period of at least one year."[103] In other states, failure to pay child support, while not an express ground for termination, may lend support to an effort to terminate parental rights. For example, in Pennsylvania, parental rights may be terminated where a parent has for six months "refused or failed to perform parental duties."[104] Among these duties are the payment of child support where due. While in Pennsylvania, "failure to pay child support is not, standing alone, adequate grounds for termination of parental rights,"[105] it is one factor that can be considered in the totality of the circumstances.

In addition, there is an increasing trend to incarcerate parents (so-called "deadbeat dads") for failure to pay child support, even where the failure to pay is caused primarily by poverty. These incarcerated parents can face the same problems as other incarcerated parents whenever their children come into contact with the child welfare system.

## Policy Recommendations

Incarcerated and ex-offender parents face many obstacles in keeping their families together. Parents who are convicted of a crime should not have to fear that they will automatically receive the "additional sentence" of termination of their parental rights.[106] To this end, states must provide those services that will make it possible for families to reunify after parents have completed their sentences. They must ensure that parental rights are only terminated based on the facts of the case and not due to the operation of overbroad law.

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[100] Two articles, Eve A. Stotland, *Resolving the Tension Between Child Support Enforcement and Family Reunification*, 35 Clearinghouse Rev. 317, 324-325 (Sept.-Oct. 2001), and Welfare Information Network, Issue Note, *Support Services for Incarcerated and Released Noncustodial Parents* (June 2000), http://www.welfareinfo.org/heidijune2.htm, contain a thorough discussion of the impact of child support enforcement on family reunification as well as descriptions of innovative state practices that address these issues. For a broader discussion of child support enforcement policy issues, including issues affecting incarcerated parents, see Paula Roberts, *An Ounce of Prevention and a Pound of Cure: Developing State Policy on the Payment of Child Support Arrears by Low-Income Parents* (Center for Law and Social Policy, May 2001) (hereinafter "Ounce of Prevention").

[101] *See* 42 U.S.C. § 671(a)(17), which provides for the assignment to the state of child support rights for a child who is the subject of federal foster care payments. Some states interpret this provision as a mandate to seek child support from parents whenever a child is placed in foster care, even where there is no current child support order in effect.

[102] *See* 45 C.F.R. § 235.70 (requiring notice to the state or local child support agency whenever AFDC is provided to a child on the basis of the parent's absence from the home).

[103] H.R.S. § 571-61(b)(1)(D).

[104] 23 Pa. C.S.A. § 2511(a)(1).

[105] *In re Atencio*, 539 Pa. 161, 168 n. 6 (1994).

[106] This phrase is taken from Steven Fleischer, *Note: Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 Seton Hall L.Rev. 313.

Lastly, they must provide strict procedural due process to incarcerated parents and ex-offenders.

## States must make appropriate services available to incarcerated parents and their families.

States must ensure that appropriate services are available to assist incarcerated parents with reunification. This may well require a commitment of resources beyond what presently exists. Otherwise, parents will complete their terms with no realistic hope of ever regaining custody of their children.

### 1. States must actively encourage kinship care placements.

Relative placement is probably the most important way to preserve children's ties with incarcerated parents. As discussed above, under ASFA, a state is not required to file a petition to terminate parental rights, regardless of the length of time a child has been in placement, if the child is being cared for by a relative.[107] To encourage relative placement wherever possible, states should require that child welfare social workers seek out relatives who might be available as caregivers whenever placement is contemplated and that no unreasonable barriers be placed to the relatives' approval as caregivers.[108] In addition, relatives frequently do not have the financial resources to take in a child. States should provide kinship caregivers with the same remuneration that is given to other foster parents.[109]

Furthermore, relative caregivers may need special services in order to provide appropriate care. Many children arrive in placement suffering some degree of trauma,[110] and relatives may need special training to meet the children's needs. These services are typically offered to non-relative foster parents and should be made available to kinship caregivers as well.[111]

### 2. States must ensure that child welfare authorities remain in touch with incarcerated parents.

Caseworkers must make serious and immediate efforts — both at the beginning of a case and later, if the agency's contact with a parent is lost without explanation — to locate an absent parent whenever placement of a child is contemplated. The same parent who is casually listed in the agency file as "address unknown" may be incarcerated and desperately trying to locate his or her child. Too often, no serious search is made for a parent, especially a noncustodial father, until the filing of a petition to terminate parental rights; a prisoner may not know until long after the event that his or her child has been placed in foster care. The child welfare agency's search for parents must make use of all available resources, including a thorough check of criminal justice system records and, where permitted, federal and state parent locator services. Jail or prison social workers can assist as well by asking inmates upon arrival about their children's living arrangements and, where parents wish, helping them develop plans for contact with their children and for meeting their reunification objectives.

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[107] 42 U.S.C. § 675(5)(E)(i). The decision not to file a petition under these circumstances is "at the option of the State."

[108] Some child welfare social workers maintain a residual bias *against* relative placement, viewing the relative as likely to share many of the same problems as the parent. As a result, these social workers can be reluctant to seek out or approve relative placements. State policy favoring relative placement must be made explicit and strong in order to counteract this bias. Of course, the policy favoring relative placement must allow for exceptions. In many cases, after consideration of the individual circumstances, the option of relative placement will appropriately be rejected.

[109] *See, e.g.*, California's Kinship Guardianship Assistance Payment Law (Kin-GAP), Cal. Welf. & Inst. Code § 11360 *et seq.*, which provides for certain kinship caregivers to receive the same payments to which they would be entitled as non-related foster parents. *Id.* at § 11364.

[110] *See* Christine Jose Kampfner, "Post-Traumatic Stress Reactions in Children of Imprisoned Mothers," in Katherine Gabel and Denise Johnston, eds., *Children of Incarcerated Parents* 95 (1995) (in one study of children whose mothers were in prison, 70 percent of the children were present at their mothers' arrests, and 75 percent reported symptoms of post-traumatic stress). Other children may have been neglected or abused prior to placement.

[111] California provides, for example, that "[r]easonable services [must be given] to extended family members or foster parents providing care for the child if the services are not detrimental to the child." Cal. Welf. & Inst. Code § 361.5(e)(1)(D).

In addition, child welfare workers should act affirmatively to remain in contact with incarcerated parents. Agencies must make it their policy to accept collect calls from incarcerated parents, and must require contracted foster care agencies to do the same. States should also encourage, and in appropriate cases require, foster parents to accept collect calls from incarcerated parents — with provisions for reimbursement of the cost to the foster parent in appropriate instances — where such calls are the only effective way to maintain parent-child contact. Agencies also must provide for incarcerated parents to participate in case service planning, whether by phone hookup or by holding planning meetings at the parent's institution.

### 3. States must facilitate visitation between children and incarcerated parents.

States must do more than most now do to encourage and facilitate visitation and to create alternative facilities that will allow incarcerated parents and their young children to reside together. A number of excellent models exist, though they typically do not have the capacity to meet the demand. California has created several community-based treatment centers where mothers may reside with their children under age six. Admissions requirements are stringent.[112] Moreover, as a 1998 study pointed out, "[T]here are only ninety-seven beds available in the program in six centers statewide, and there are perhaps thousands of women in California prisons who could qualify. No men qualify for the program because the statute is explicitly written for mothers."[113] In another California program, the "Family Foundations Program," mothers are sentenced directly to a residential facility instead of a prison for periods of one to three years.[114]

New York has what is probably the nation's most comprehensive mother-child program at its Bedford Hills Correctional Facility Children's Center.[115] Located at a maximum security prison for women, the Children's Center has a playroom for visiting children, a parenting center, a nursery where parents may keep their children for up to one year, a community-based shelter for battered women and their children, and nearby foster homes reserved for the children of inmates.[116]

The Bedford Hills nursery program is open to mothers with young babies. As in the California programs, participation requirements are strict.[117] Mothers get diapers, strollers, baby food, formula, and health care for their infants, and they must attend mandatory parenting classes. Bedford Hills also has programs for women with older children. During summer months, the community of Bedford Hills hosts children of incarcerated mothers for a week during which they may see their mothers every day. During the school year, community members host the children one Saturday night each month.

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[112] Before being admitted to the program, a mother is carefully screened. She must have no history of violence or escape and "must be deemed [a fit parent] with no record of child abuse." Once accepted to the program, the mother is provided with parenting classes, substance abuse treatment, employment training, and related counseling services. Initially, a mother is restricted to the facility. However, as she progresses she is able to participate in off-site jobs and other activities. Heidi Rosenberg, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 Golden Gate U. L. Rev. 285, 317-18 (2000) (hereinafter "Rosenberg").

[113] Zealand, *supra* note 75, at 256, citing Cal. Penal Code §§ 3411, 3417, 3419.

[114] *See* Rosenberg, *supra* note 112, at 318-19.

[115] For a general discussion of the benefits of prison nurseries, with a focus on the Bedford Hills Correctional Center and the Nebraska Correctional Center for Women, *see* Nicole Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 Cardozo Women's L.J. 101 (1998). *See also Development in Law: Alternatives to Incarceration*, 111 Harv. L. R. 1921 (1998).

[116] Genty, *supra note* 4, at 24 n. 123. *See also* Mauskopf, *supra*, at 108-09, from which are taken the descriptions that follow of the nursery program and program for older children at Bedford Hills.

[117] In order to participate, a woman cannot be sentenced to more than five years, and she must attend classes both before and after the baby is born. Women addicted to drugs must be in treatment. Women who have been convicted of violent crimes, arson, or crimes involving children are excluded from the program.

On a lesser scale, one women's prison in Minnesota has a parenting unit where mothers may spend several nights a month with their young children, and where teenage children may come one Saturday a month to enjoy family activities — basketball, crafts, and lunch — with their mothers.[118] Ohio offers a "camp" that incarcerated mothers can attend with their children.[119]

Other states should emulate these programs, and all states should extend them to men's detention facilities. As rare as these programs are for incarcerated mothers, they are virtually nonexistent for fathers.[120]

Where these programs are not implemented or parents are ineligible for participation, states must encourage other forms of contact between incarcerated parents and their children and between parents and the child welfare agency itself. As one example, Pennsylvania offers a "Read to Your Children" program, in which incarcerated parents are filmed reading to their children, and the videotape and book are then sent to the child. States should adopt statutory provisions similar to New York's requiring that agencies make suitable arrangements for visitation.[121]

### 4. Appropriate reunification services must be made available to incarcerated parents.

If incarcerated parents are to have any chance of reuniting with their children after they have served their time, services such as parenting and life skills programs, individual and group therapy, family therapy in conjunction with visits, drug and alcohol treatment, GED and other education programs, and vocational training must be available in prison. Family service or reunification plans frequently call on parents to make use of some or all of these services. Parents who do not have access to these services in prison may well have insufficient time after release to improve the conditions that led to the children's placement or to do what is necessary to be able to resume custody of the children. Yet these services are rarely available to prisoners, especially to men.[122]

Especially because of ASFA's permanency time frames, it is essential that service delivery begin immediately upon incarceration. Service plans must coincide with the length of sentence and not end after an arbitrarily determined period. In addition, plans must be made during incarceration for services to address the issues the family will encounter after the parent's release. Ex-offenders face many obstacles that can affect family functioning. Child welfare agencies must be ready with assistance that will allow a family to reunify successfully.

Where services cannot be made available, family service plans must reflect that fact. It is ludicrous to demand, as did the child welfare agency in one case, that an incarcerated parent "attend a drug treatment program, maintain suitable housing, demonstrate a source of legal income, etc.," where no such options were available to or possible for someone who was incarcerated.[123] As in cases that do not involve incarceration, a petition to terminate parental rights should not be filed where reasonable reunification services have not been provided. ASFA recognizes the state's failure to provide reasonable services as a basis for not filing a petition to terminate parental rights, regardless of the length of time a child has been in foster care.[124]

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[118] Zealand, *supra* note 75, at 257.

[119] *Id.* at 258.

[120] *See* Patton, *supra* note 75; Zealand, *supra* note 75.

[121] N.Y. Soc. Serv. Law § 384-b(7)(f)(2).

[122] One study notes as an example that there are parenting programs in Michigan's two women's prisons but none in its men's. Zealand, *supra* note 75, at 257.

[123] *In re Brittany S.*, 17 Cal. App. 4th 1399, 1403 (1993). The court observed: "We are fearful that, in the era of the word processor, boilerplate terms are inserted into service plans regardless of their applicability to a particular parent." *Id.* at 1403, n. 3.

[124] 42 U.S.C. § 675(5)(E)(iii).

### 5. Alternatives to incarceration could make child welfare intervention and child removal unnecessary in many cases.

While a discussion of this topic is well beyond the scope of this report, many of the worst consequences of parents' criminal convictions to their children and families could be avoided were appropriate alternatives to incarceration made more readily available.

## States must avoid overly broad application of the law and ensure that decisions are made based on the facts of each case.

### 1. States must avoid overly broad termination statutes and statutory interpretation.

Many states allow termination of parental rights based on parents' convictions for crimes not directly related to their ability to care for their children. While courts are typically given discretion to overlook such crimes, overburdened judges frequently do not give individual cases the attention they need for fair consideration of individual circumstances. Likewise, overburdened child welfare agency workers do not always present full or accurate information about the nature of a parent's conviction. State laws, such as the Illinois provision allowing termination after a third felony conviction,[125] need to be revised to ensure that parental rights will not be terminated based on a parent's conviction except where the underlying crime is directly relevant to the ability to care for a child.[126] Courts must "look beyond the parent's inability to care physically for the child and focus instead on the 'parent's responsibility to provide a nurturing parental relationship,'" even while incarcerated.[127]

Other laws, such as those limiting ex-offenders' eligibility as foster or adoptive parents, similarly must be based not on irrebuttable presumptions but instead must consider individual circumstances. Oklahoma is one state that has done this, expressly electing to make ASFA's provision inapplicable and enacting a more flexible standard in its place (see Appendix B).[128]

### 2. ASFA's time deadlines must be applied flexibly.

Under ASFA as commonly — and wrongly — perceived, "permanency" has come to be the sole driving force behind many decisions regarding termination of parental rights, rather than one important factor among many.[129] This creates serious inequities in many cases. Where appropriate, states should allow reunification efforts to continue beyond 12 months. This should be so in any case where a child's best interests are not met by termination, and especially so where a parent's incarceration for a longer period is the only major factor preventing reunification.

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[125] 750 I.L.C.S. § 50/1(1)(D)(i).

[126] *See generally* Cahn, *supra* note 13. A termination of parental rights also acts to terminate other important relationships, such as with siblings, other relatives, and the community. Evaluation of a child's best interests should also consider these relationships. *Id.* at 1210.

[127] Genty, *supra* note 4, at 769, quoting *In re Daniel C.*, 480 A.2d 766 (Me. 1984). Genty points out that overbroad laws deny parents due process of law. A presumption that conviction or incarceration gives automatic grounds for termination of parental rights is improper:

> [P]rocedural due process considerations go beyond the question of the manner in which the hearing is to be conducted. The requirement of an *individualized* showing of parental unfitness necessitates a thorough, searching inquiry into the circumstances of the particular incarcerated parent and her family; the fact of the parent's crime and the length of her sentence cannot serve as proxies for a finding of unfitness.

Genty, *supra* note 4, at 771.

[128] 10 Okl. St. § 7505-6.3(G). ASFA permits this election. 42 U.S.C. § 471(a)(20(B).

[129] This characterization is based on the author's experiences in his practice representing parents in Philadelphia. Given the relatively short period of time during which ASFA has been in effect, reliable national data are not yet available to show how rigidly ASFA's time deadlines are being applied or how widely used are the ASFA-approved exemptions to the requirement to file for termination. Anecdotal information provided to the author suggests that practice varies widely from jurisdiction to jurisdiction and even among different judges within a single jurisdiction. A report based on early data from 12 states showed that the exemptions had been applied in about 60 percent of the cases reviewed. U.S. General Accounting Office, Letter Report, *Foster Care: States' Early Experiences Implementing the Adoption and Safe Families Act* 12 (Dec. 12, 1999) GAO/HEHS-00-1. Of the 12 states surveyed, the percentage of cases in which an exemption was applied ranged from 39 percent to 94 percent. *Id.* at 13. The two exemptions most commonly applied were where a child was placed with a relative and where compelling reasons existed not to terminate parental rights. *Id.* at 12-13. Very few children were exempted for the third ground specified in ASFA, the failure to provide reasonable reunification services. *Id.* at 13. According to the report, one county reported the most common compelling reasons are where "the parents are in compliance with or nearing completion of the services outlined in the case plan and the family is expected to reunite imminently or within 30 days," where "the child is over a specified age (such as 12 years or older), does not want to be adopted, and has another permanency option," and where "the child suffers from severe emotional or behavioral problems or a developmental disability, and needs ongoing treatment in a residential setting or needs to be stabilized." *Id.* at 12-13.

Attitudes vary widely among individual judges, attorneys, and child welfare personnel toward the place of permanency in the hierarchy of considerations in a child welfare case. The attitudes of the individual professionals involved in a given case can play a crucial role in the direction the case takes. It is therefore critical that all those involved in a case understand the full range of options provided within the ASFA structure; that is not currently the case. As discussed above, ASFA recognizes that a termination petition need not be filed where the case plan documents a "compelling reason" why termination is not necessary or appropriate.[130] States in their legislation and child welfare agencies in their practices must be encouraged to make full use of this provision. States must recognize and document compelling reasons in every case where they in fact exist.

In addition, virtually all states provide that even where grounds for termination exist, parental rights may not be terminated unless termination serves the best interests of the child.[131] In determining whether to file a termination petition, states should therefore exercise their discretion under ASFA not to file wherever termination would not be in a child's interest, whether because there exists a significant parent-child bond, a child is unwilling to be adopted, a parent will be able to resume care of a child but not within 12 or 15 months, a parent has the desire and ability to provide for the child's needs even while incarcerated, or some other reason. When a state nonetheless files a petition, but there is evidence that termination does not serve the child's interest, the court must act to deny the petition. ASFA's rigid permanency timetable must not be allowed to trump the best interests of the child.

### 3. States should offer relief from child support obligations to parents who are returning from incarceration and seeking reunification with their children.

A strict child support collection policy makes little sense when it interferes with family reunification. Parents returning from incarceration typically face high hurdles, financial and otherwise, in establishing a household where they can care for their children. A child support debt need not be one of these barriers. In cases where seeking support would be inappropriate, states have the discretion not to seek support in the first place.[132] Moreover, states can adopt policies, as has the state of Washington, allowing child welfare agencies to identify and refrain from seeking enforcement of a support order in cases where enforcement is inappropriate and would conflict with a reunification plan.[133] Additional debt forgiveness policies can be implemented as well, even in cases where child support obligations are mandatory.[134]

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[130] 42 U.S.C. § 675(5)(E)(ii).

[131] See discussion, *supra*. ASFA's implementing regulations recognize that a termination petition need not be filed in cases where state law would not support termination. *See supra* note 68.

[132] This policy is discussed in Stotland, *supra* note 100, at 327. *See also* discussion of child support enforcement options in *Ounce of Prevention*, *supra* note 100.

[133] Wash. Admin. Code § 388-25-0225(2). This provision is discussed in Stotland, *supra* note 100, at 325, 327.

[134] Stotland, *supra* note 100, at 327-29.

## States must scrupulously respect procedural fairness and ensure that termination procedures comply with requirements of due process.

Several elements of procedural due process are of special concern to incarcerated parents.[135]

### 1. States must ensure that incarcerated parents have the opportunity to attend all hearings in their case.

Courts must take responsibility for ensuring that incarcerated parents are brought to hearings. Attendance at court hearings is necessary for a parent to participate meaningfully in a case. Although some states provide for incarcerated parents to be transported to all hearings, many states do not. California has the most comprehensive statute on this point, requiring that an incarcerated parent be present in court for any hearing on adjudication or termination of parental rights, unless the parent signs a written waiver.[136] In other states, however, a prisoner will be brought to court only if convenient. No state routinely provides transportation to child welfare hearings for parents incarcerated out of state.[137]

In some locations, telephone hookups are used in lieu of transporting prisoners to court, but this practice is inadequate. Most obviously, it limits judges' ability to evaluate parents' credibility. Perhaps more importantly, the practice subtly prejudices the court against parents by highlighting the parents' absence from their children.

### 2. Incarcerated parents must be provided with counsel.

Every incarcerated parent must be represented by counsel at all stages of the case, not just when termination is at issue. Crucial decisions are made in the early stages of a case — decisions including whether or not to approve a relative placement, what reunification services will be made available to a parent, and what visitation the parent may have with the child.

Some states guarantee the right to counsel to parents in child welfare cases,[138] and all other states should adopt similar guarantees. As one commentator noted:

> Far more than other parents, an incarcerated parent must depend almost completely on others for logistical assistance. For example, without the assistance of counsel, a prisoner cannot walk into a courthouse to look at court records, telephone and visit potential witnesses, arrange to appear for court hearings, or talk to opposing counsel prior to the court date. All of these are basic tasks that may be essential to an effective defense in a termination proceeding.[139]

Lawyers representing incarcerated parents must be committed to aggressive advocacy for the special needs of their clients and must be prepared to deal with the logistical constraints caused by their clients' incarceration. Social service or legal aid organizations with special interest in the needs of incarcerated parents can create programs to provide self-help workshops and informational materials to social service providers and to parents themselves, as well as training, backup, and support to volunteer and court-appointed counsel.[140]

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[135] For a detailed discussion of the application of these due process elements in the context of parental rights termination proceedings, see Genty, *supra* note 4. Philip Genty's scholarship forms the basis for the following discussion of due process concerns.

[136] Cal. Penal Code § 2625.

[137] For a discussion of the law and practice in different states with regard to incarcerated parents' participation in court proceedings, see Genty, *supra* note 4, at 774-78.

[138] *See, e.g.*, Pennsylvania's Juvenile Act, 42 Pa. C.S.A. § 6337 (Appendix C). On its face, however, this provision requires that a party "appear" in order to be appointed counsel. While one might hope that this provision would be applied and counsel appointed where an incarcerated party is unable to appear personally, the author has observed that some judges do not appoint counsel without an express request. Many incarcerated parents fail to make such a request, either because they are unaware of the right, because they are unaware of the proceedings altogether, or because they do not know how to make the request from their place of incarceration.

[139] Genty, *supra* note 4, at 781.

## Conclusion

Conviction for a crime should not represent an automatic death sentence to a family.[141] Yet for families caught up in the child welfare system, this can too often be the result, especially as a consequence of the enactment of ASFA. To protect parents and children from this result wherever possible, the child welfare system must dedicate itself to providing increased and improved services to incarcerated and newly released parents. Due process for incarcerated parents and ex-offenders must take account of problems caused by the fact of incarceration. Decisions made by a child welfare worker or a judge must consider the circumstances of each case. Where the law does not now permit individual consideration, it must be changed, whether by statutory amendment or by litigation. Otherwise, countless parents, having completed their sentences and paid their debt to society, will face a far greater loss than their freedom in losing their children forever. Their children, having already suffered their parents' absence while under incarceration, will suffer more in losing their parents completely. Where these losses are unavoidable, they need be accepted. But they must not be forced by application of law where an alternative approach would allow the parent-child relationship to continue after incarceration.

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[140] One such program is "Family Ties," a project formed by the Family Law Unit of South Brooklyn Legal Services in Brooklyn, New York, which works collaboratively with a number of other social service providers and advocacy organizations. In addition to the services described above, Family Ties represents formerly incarcerated individual clients. The program is described in detail in Shapiro, Vogelstein, and Light, *supra* note 41. Federal restrictions applicable to organizations receiving federal funding from the Legal Services Corporation prohibit most legal services offices from representing currently incarcerated individuals. *See* 45 C.F.R. Part 1637.

[141] In one judge's words, "[t]ermination of parental rights is the death sentence to a parent-child relationship." *In re Coast*, 385 Pa. Super. 450, 483 (1989) (Tamilia, J., concurring).

# Appendices on Child Welfare System

## Appendix A: Reunification Services for Incarcerated Parents

California law provides:

> If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered, and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, and any other appropriate factors. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following:
>
> (A) Maintaining contact between the parent and child through collect telephone calls.
>
> (B) Transportation services, where appropriate.
>
> (C) Visitation services, where appropriate.
>
> (D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.
>
> An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available.
>
> Cal. Welf. & Inst. Code § 361.5(e)(1).

New York law defines required "diligent efforts" to include:

> [M]aking suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child.
>
> N.Y. Soc. Serv. Law § 384-b(7)(f)(5).

# Appendix B: Standards for Prospective Adoptive Parents

Oklahoma's statute provides as follows:

1. Except as otherwise provided by this subsection, a prospective adoptive parent shall not be approved for placement of a child if the petitioners or any other person residing in the home of the petitioners has been convicted of any of the following felony offenses:
    a. within the five-year period preceding the date of the petition, physical assault, domestic abuse, battery or a drug-related offense, except as otherwise authorized by this subsection,
    b. child abuse or neglect,
    c. a crime against a child, including, but not limited to, child pornography, and
    d. a crime involving violence, including, but not limited to, rape, sexual assault or homicide, but excluding physical assault or battery.
2. A prospective adoptive parent may be an approved placement regardless of whether such parent has been convicted of any of the felony offenses specified by subparagraph (a) of paragraph 1 of this subsection, if an evaluation has been made and accepted by the court which considers the nature and seriousness of the crime in relation to the adoption, the time elapsed since the commission of the crime, the circumstances under which the crime was committed, the degree of rehabilitation, the number of crimes committed by the person involved, and a showing by clear and convincing evidence that the child will not be at risk by such placement.

10 Okl. St. § 7505-6.3(G).

## Appendix C: Right to Counsel

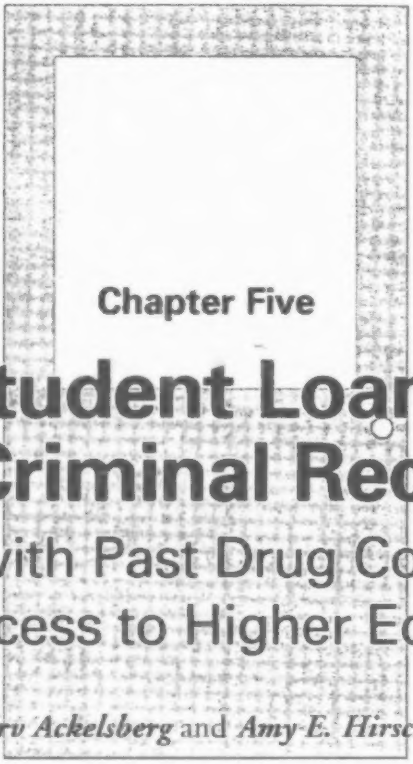
Pennsylvania law provides:

> A party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if he is without legal resources or otherwise unable to obtain counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if applicable. The court may continue the proceeding to enable a party to obtain counsel.
>
> 42 Pa. C.S.A. § 6337.

## Appendix D: Preference for Relative Foster Care Placements

Arkansas law states:

> In all custodial placements by the Department of Human Services in foster care..., preferential consideration shall be given to an adult relative over a nonrelated caregiver provided that the relative caregiver, meets all relevant child protection standards and it is in the child's best interest to be placed with the relative caregiver.
>
> Ark. Stat. Ann. § 9-9-102(a)



## Chapter Five

# Student Loans and Criminal Records:

## Parents with Past Drug Convictions Lose Access to Higher Education

***Irv Ackelsberg*** and ***Amy E. Hirsch***

> *The Higher Education Act (HEA) has me in a tailspin — I can't understand how anyone could believe that denying a woman the chance to go to school could help her change her life for the better.*[1]

## Introduction

Access to higher education is important for low-income parents who are trying to improve their ability to support their families.[2] For many working parents, a return to school may be a matter of economic necessity. For ex-offender parents, who face additional difficulties finding work in the low-wage sector, the decision to enroll in college can represent an enormously powerful opportunity to enter mainstream society.[3] No matter how positive such a step might be — not only for the parent and her children, but also for society at large — the ex-offender seeking to enroll in college may find yet another door closed to her, the door to federal financial aid.

As part of its 1998 reauthorization of Title IV of the Higher Education Act of 1965,[4] Congress enacted a complicated eligibility restriction applicable to students who have prior convictions for possession or sale of controlled substances.[5] Applicants subject to this bar cannot obtain Pell grants or student loans, which, for low-income students, effectively means a denial of higher education. [6] Even applicants not technically subject to the bar may be discouraged from applying for financial aid as a result of misinformation, bad advice, or wrong assumptions about how the new law works.

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[1] Harmon, *A Bridge to a Better World*, Sojourner: The Women's Forum 23 (Nov. 2000).

[2] See, e.g., Robert Reich, *The Work of Nations* 213 (1992). Prior to the 1996 federal TANF legislation, which made it much more difficult for welfare recipients to attend college, a number of studies of welfare recipients in higher education activities found links between even one or two years of college education and increased income. *See generally* Center for Women Policy Studies, *Getting Smart about Welfare: Postsecondary Education is the Most Effective Strategy for Self-Sufficiency for Low-Income Women* (1995); Marilyn Gittell *et al.*, *Building Human Capital: The Impact of Post-Secondary Education on AFDC Recipients in Five States* (Howard Samuels State Management and Policy Center, City University of New York, 1993).

[3] See Harmon, *supra* note 1.

[4] Pub. L. 105-244, Title IV, 483(f), Oct. 7, 1998, 112 Stat 1735, 1736. Title IV is the financial aid program that provides grants and loans to students attending institutions of higher education. Aid is available to students attending colleges and universities, as well as certain public and proprietary trade schools. See 20 U.S.C. §§ 1001, 1002.

*The New York Times* reported on December 29, 2001, that "[m]ore than 43,000 college students face possible denials of federal aid this [school] year" as a result of the 1998 ban.[7] This chapter discusses the importance of access to education for ex-offender parents, describes the statute and regulations that deny financial aid to those parents, and recommends changes.

## The Importance of Access to Education for Ex-Offender Parents

Access to education for ex-offender parents is important to the parents as individuals, to their children, and to society. Education increases employment opportunities for people with criminal records, reduces recidivism, and helps parents set positive examples for their children.

The limited educational backgrounds of imprisoned parents have been well documented. The Bureau of Justice Statistics found that a "majority of parents in both State (70 percent) and Federal (55 percent) prison reported that they did not have a high school diploma."[8] The impact of those limited educations on employment opportunities has also been documented[9] and is reflected in this comment from a parent with a drug conviction, discussing the unstable jobs she has held in the past:

> I want to get my GED and get totally educated. I had a good job and they closed down with no notice. I need to get educated and qualified. I want some backbone, some papers that say I completed something and I'm capable. I want to get a college degree.[10]

Women with criminal records *and* histories of alcohol or drug addictions may be particularly in need of further education. An Ohio study that examined women's needs for services upon release from jail found that women who reported that they needed drug treatment services were more likely to report needing education (62 percent versus 37 percent) than women who did not report a need for such services.[11] Of course, these women were also more likely to have a drug-related charge, and thus to be vulnerable to the ban on student financial aid.

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[5] Prisoners lost their financial aid eligibility in the 1992 reauthorization. *See* 20 U.S.C. § 1091(b)(5).

[6] By way of example, the in-state tuition for Temple University, a public university, was $6,648 per year during the 2000-2001 academic year. *See* www.temple.edu. The cost to attend Community College of Philadelphia full-time is approximately $1,200 per semester, not including books. *See* www.ccp.cc.pa.us. From the authors' experience, the tuition charged by a typical trade school is substantially higher than the tuition charged by community colleges. Even the cheapest of these alternatives, community college, is unaffordable without loans or grants. For example, the maximum welfare grant for a mother and child with no other income in Philadelphia is $316 per month (a total of $1,264 during the course of a four-month semester), so paying tuition would leave the family with only $64 to purchase books and pay all household expenses during the semester. A parent in a low-wage job would similarly be unable to afford tuition after paying for rent, food, clothing, child care, and other expenses.

[7] Associated Press, *43,000 Students With Drug Convictions Face Denial of Aid*, N.Y. Times, Dec. 29, 2001, at A11.

[8] Christopher J. Mumola, *Special Report: Incarcerated Parents and Their Children* 3 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2000) (hereinafter "Mumola"). The report further finds that of parents incarcerated in state prisons in 1997, 13 percent had an 8th grade education or less, 27 percent had some high school, 31 percent had GEDs, 16 percent were high school graduates, and 13 percent had some college or more. *Id.* at table 3.

[9] Jared Bernstein and Ellen Houston, *Crime and Work: What We Can Learn From the Low-Wage Labor Market* (Economic Policy Institute, 2000).

[10] Quotation from Caroline in Amy Hirsch, *"Some Days Are Harder Than Hard:" Welfare Reform and Women With Drug Convictions in Pennsylvania* 30 (Center for Law and Social Policy, 1999). Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

[11] Sonia A. Alemagno, *Women in Jail: Is Substance Abuse Treatment Enough?* 91 Am J Public Health 798, 799 (2001).

There is significant evidence that quality education is an effective form of crime prevention.[12] A recent report by the Iowa Governor's Task Force on Overrepresentation of African-Americans in Prison concluded that "education provides the best long-range opportunity for reducing incarceration rates among African-Americans in Iowa prisons."[13] The Criminal Justice Policy Council tracked 25,000 Texas inmates released over a two-year period and found that prison education programs reduced recidivism rates.[14] Other studies, including another from Texas and a report from the Federal Bureau of Prisons, have found that "the more education received, the less likely an individual is to be re-arrested or re-imprisoned.... Research studies conducted in Indiana, Maryland, Massachusetts, New York, and other states have all reported significantly low[er] recidivism rates for inmate participants in correctional higher-education programs."[15]

Although prison educational programs are proven to be cost-effective in preventing recidivism, many jurisdictions reduced funding or completely eliminated education programs within correctional facilities during the 1990s.[16] "In 1990 there were 350 higher education programs for inmates. In 1997 there are 8," according to the Center on Crimes, Communities & Culture.[17] The loss of educational opportunity for incarcerated parents means that access to education after release is even more critical.

## The Ban on Student Financial Assistance for Ex-Offenders with Drug Convictions

The 1998 legislation, known as the Souder Amendment after its author, Rep. Mark Souder of Indiana, is codified at 20 U.S.C. § 1091(r). It applies to any aid applicant "who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance," and the ban on aid lasts for the following time periods:[18]

| **Possession Convictions** | **Ineligibility Period** |
|---|---|
| First offense | One year |
| Second offense | Two years |
| Third offense | Indefinite |
| **Sale Convictions** | **Ineligibility Period** |
| First offense | Two years |
| Second offense | Indefinite |

A student suspended from federal financial aid under this provision can regain eligibility before the end of the relevant ineligibility period by having the conviction invalidated or by completing a drug rehabilitation program that meets certain criteria, including two unannounced drug tests.[19]

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[12] The Center on Crime, Communities & Culture, *Research Brief: Education as Crime Prevention* (Sept. 1997).

[13] *Report of the Governor's Task Force on Overrepresentation of African-Americans in Prison* 5 (Dec. 2001), www.state.ia.us/governor/news/2001/December/December1801_1.html.

[14] John W. Gonzalez, *Study: Education in Prison Helps Curb Repeat Offenses*, Houston Chronicle, Aug. 29, 2000.

[15] Center on Crime, Communities & Culture, *supra* note 12, at 6 (citations omitted).

[16] Jeremy Travis, Amy L. Solomon, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 34 (Urban Institute, June 2001); Center on Crime, Communities & Culture, *supra* note 12.

[17] Center on Crime, Communities & Culture, *supra* note 12, at 11 (citations omitted). *See also* Travis *et al.*, *supra*, at 34. Congressional action eliminating prisoner eligibility for Pell Grants in 1992 accelerated the loss of educational opportunities for inmates. *See* 20 U.S.C. § 1091(b)(5).

[18] 20 U.S.C. § 1091(r)(1). By regulation, the Department of Education clarified that convictions of multiple counts are considered a single conviction, and that juvenile convictions are not counted. However, the Department also defined an "indefinite" period of ineligibility to mean "permanent" ineligibility. 64 Fed.Reg. 57356 (Oct. 22, 1999).

[19] 20 U.S.C. § 1091(r)(2). Besides including at least two unannounced "drug" tests, presumably urine tests, the program must have received or must have been qualified to receive funding under a government program, must have been administered or "recognized" by a government agency or by a court, must have been qualified to receive third-party insurance reimbursement, or must have been administered by a federal or state licensed hospital, clinic, or doctor. 34 C.F.R. § 668.40(d), 64 Fed. Reg. 57355, 57359 (Oct. 22, 1999).

The Department of Education uses the Free Application for Federal Student Aid (FAFSA)[20] to enforce the Souder amendment, by questioning financial aid applicants about drug-related matters. Question 35 on the FAFSA asks the applicant to fill out a special worksheet consisting of nine questions that are designed to enable the applicant to identify herself as belonging in one of three groups: (1) not affected by the drug-conviction provision, (2) affected for a portion of the academic year as a result of an ineligibility period, or (3) ineligible.[21] For many applicants with prior drug convictions, completion of the worksheet will indicate that the provision does not apply at all, due to the passage of time since the last conviction or to the completion of a prior rehabilitation program. But for many ex-offenders who are struggling to make their way to college, Question 35, or rumors or misinformation about Question 35, may be so alarming or embarrassing that they incorrectly identify themselves as subject to the provision or simply abandon the application altogether. In the words of one ex-offender: "When I learned that [the Higher Education Act] ... might prevent me from getting school loans this year, I almost stopped the financial aid process. I couldn't face being shamed again, having to prove myself again."[22]

The eligibility ban originally was intended to apply only to recipients of financial aid who are convicted of drug offenses while in school, not to financial aid applicants with drug convictions in their past.[23] Rep. Souder made this clear on the floor of the House when he introduced a technical amendment in June 2000 "to clarify some things that I believe were misunderstood:"[24]

> All the way through the whole debate, I never said anything differently than what I said today, which is that if one is going to take a student subsidized loan they should be held accountable. Yet for some unusual reason, and I am not faulting them for doing it because it was their decision to do so, the Clinton administration interpreted this to mean that anybody [who] prior to going into college had been convicted [would also lose eligibility].
>
> It meant people that were coming back in midlife or adulthood all of a sudden were not eligible, theoretically, at least for student loans. There was nowhere in any record that suggested that any of us were advocating a reachback provision. The language was very explicit, I believed, which is if one takes taxpayer dollars, then they are expected to behave legally.
>
> Now, what we need to do is to try to reach to those students who often are young people or middle-aged people who are coming back, who have had a tough time in life, who have been convicted of a drug crime, and now they want to go to college. The goal here is not to punish them.[25]

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[20] Completion of a FAFSA is the first step for determining student eligibility for financial assistance. Students and their families complete a FAFSA by mail or online at www.fafsa.ed.gov. This results in an eligibility determination that is then communicated to the schools listed by the student on the application. For general information about the FAFSA, see www.fafsa.org.

[21] A copy of the worksheet is available through the website of the Coalition for HEA Reform at www.raiseyourvoice.com.

[22] Harmon, *supra* note 1.

[23] 144 Cong.Rec. H 2424, 2580 (April 28, 1998) (remarks of Rep. Souder, focusing on increase of drug arrests on college campuses).

[24] 146 Cong.Rec. H 4181 (June 12, 2000) (remarks of Rep. Souder). His amendment would, among other things, have inserted language in the statutory provision to limit the applicable prior convictions to those that occurred "during any enrollment for which the student was receiving assistance under this title."

[25] *Id.*

Unfortunately, work on the technical amendments was never completed, leaving in place the original provision, which the Bush Administration has proceeded to enforce.[26] Rep. Souder has continued to press for an administrative interpretation of the statute that would apply the ban "solely to students already receiving federal aid when convicted."[27]

Until repeal or clarification by Congress,[28] or a change in administrative interpretation by the U.S. Department of Education, the student aid ban will continue to punish two groups of ex-offender parents who are unable to pay their tuition without the help of financial aid. The first group consists of those with recent convictions, for whom enrollment in school is part of their recovery plan. These applicants' efforts to move into education may be delayed until the expiration of the applicable non-eligibility period or completion of an approved rehabilitation program. In some cases, these potentially long delays may undermine the applicants' recovery from alcohol or drug addiction.[29]

The second group is composed of those whose convictions are in the distant past but who are rendered permanently ineligible for financial aid based on the number and character of those convictions. As explained above, an individual in this group can solve the eligibility problem to the extent that she can truthfully state that she has completed a drug rehabilitation program since her last conviction. Undoubtedly, some applicants for student financial aid will be unable to certify that fact, and these individuals will be ineligible for student financial aid unless they complete an approved rehabilitation program, regardless of whether they still need rehabilitation and regardless of their ability to find — or afford — such a program.[30]

The American Council of Education, which represents major colleges and universities, has called the restriction "double punishment" and says that it discriminates against poorer people because more affluent students do not need financial aid.[31]

## Conclusion

Access to education, including higher education, is important to the reentry efforts of parents with criminal records. If we want ex-offender parents to reintegrate fully into their communities, to find sustainable employment, to care for and encourage the education of their children, then we should support their efforts to further their own education. Amendment or repeal of the 1998 ban on student financial assistance (or administrative reinterpretation by the federal Department of Education) would be an important step forward in this regard.[32]

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[26] While the Clinton Administration used a passive, "don't tell" policy that ignored possibly untruthful or incomplete answers to FAFSA Question 35, the Bush Administration announced in its early days that it would randomly audit the truthfulness of "no" responses on the FAFSA, and that non-responses would be treated as admissions. D. Schemo, *Students Find Drug Law Has Big Price: College Aid*, N.Y. Times, May 3, 2001; Associated Press, *Bush Backs Aid Ban for Drug Convicts*, Salon.com, April 18, 2001.

[27] Associated Press, *supra* note 7.

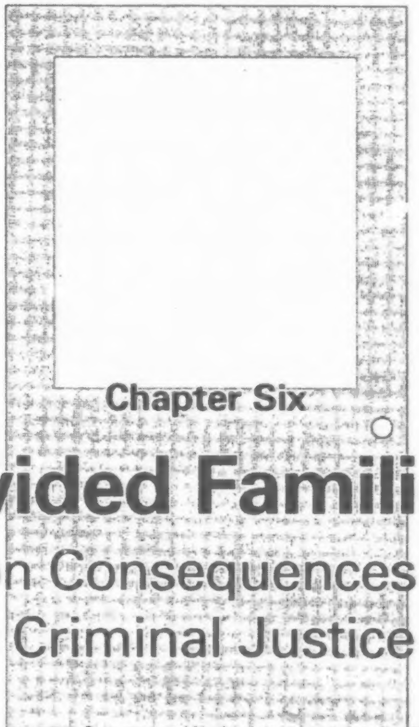
[28] In addition to Rep. Souder's effort at a technical amendment, Rep. Barney Frank of Massachusetts introduced H.R. 786 in the 107th Congress to repeal the drug conviction provision in its entirety. For a copy of the bill and the names of its current cosponsors, *see* www.raiseyourvoice.com.

[29] *See* Harmon, *supra* note 1 ("If I had been forced to wait out the year that the [Higher Education Act] now requires, I would have lost the momentum for an education ... I am sure that if I had not turned my negative [the drug conviction] into a positive [education and employment] in those early, shaky days of my new and sober life — I would be drunk or dead. I see the [Higher Education Act] as a way to keep women hopeless and helpless. How can a person rehabilitate themselves with no resources to facilitate change?").

[30] Clearly, even if the individual has health insurance, she is unlikely to be reimbursed for drug treatment in the absence of an active addiction.

[31] Associated Press, *supra* note 7.

[32] Restoration of education programs in correctional institutions, so that incarcerated parents can improve their skills and educational status before release, is also important. Similarly, although beyond the scope of this report, increasing access to education for parents receiving TANF benefits would assist many low-income parents with criminal records who are receiving welfare and who need education in order to become employable.



## Chapter Six

# Divided Families:

## Immigration Consequences of Contact with the Criminal Justice System

***Judith Bernstein-Baker*** in collaboration with ***Joe Hohenstein***

## Introduction[1]

This chapter addresses the issues confronting immigrant parents who have contact with the criminal justice or law enforcement systems. The confluence of immigration law and criminal law, particularly in the wake of 1996 changes to federal immigration law, leaves many ex-offender parents facing the loss of a fundamental "benefit" — the ability to live in the United States with their families.

Why should the U.S. population care about the intersection of immigration and criminal justice policies? Currently, there are approximately 18.2 million noncitizens in the United States.[2] "Mixed status" families — those with citizen children and noncitizen parents — represent nine percent of all American families with children.[3] The Census

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[1] This chapter was initially drafted before two significant United States Supreme Court decisions, early discussions on a legalization program for Mexican workers, and the terrorist attacks on the World Trade Center and Washington, D.C. The first Supreme Court case, *INS v. Enrico St. Cyr* 533 U.S. 678, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), deals with whether certain provisions of The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the two major statutes addressed in this chapter, could be applied retroactively to immigrants. (*See infra* notes 7 and 8.) The second case, *Zadvydas v. Davis* 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), prohibits mandatory and indefinite detention of many immigrants who cannot be returned to their native countries. These decisions, in combination with the talks between Mexican President Fox and President Bush on the status of Mexican workers in the United States, made it appear in 2001 as though we might see some mitigation of the harms caused by earlier immigration laws. These judicial and advocacy gains are now overshadowed by the deep suspicion and public ambivalence directed at immigrants, particularly those from Arab or Muslim countries, since September 11, 2001. While these developments are discussed later in this chapter, a full analysis of their effects is beyond the scope of this report.

Except where noted, all of the individual stories describe real people whose names have been changed to protect their privacy and confidentiality.

[2] Census 2000 Supplementary Survey Summary Table.

[3] *Fast Facts About Immigrants and Refugees*, Strengthening Immigrant Families Conference (June 8-10, 2000), Miami, FL (on file with the author) (hereinafter "*Fast Facts*").

Bureau estimates that in 2000 there were approximately 7 million immigrants to the U.S. without legal status,[4] including many who have lived in the United States for years and now have families here.[5]

"Undocumented immigrants" include hundreds of thousands of Central Americans who fled civil wars in the 1980s and 1990s, students, temporary workers who overstay a visa, and individuals who enter to visit family members. Many undocumented immigrants have close relatives in the United States and are eligible for family sponsorship. However, they must contend with Immigration and Naturalization Service (INS) backlogs and visa quota systems and are considered "illegal" until they get to the front of the "visa line" — which can entail a wait of ten years or longer. These immigrants are especially vulnerable, as a chance encounter with the criminal justice system or police can trigger deportation. Even if criminal charges against such individuals prove to be unfounded, these noncitizens face removal proceedings if they lack legal status. Once removed, noncitizens can be barred from entering the United States for three to ten years.[6] For those with families, including citizen children, the separation means family dissolution, economic hardship, and trauma.

The first part of this chapter analyzes the 1996 changes to immigration law and the civil immigration consequences of contact with the criminal justice system under this statutory scheme. Reactions of the legal community, human rights advocates, and media are discussed in the second section, and the final part presents policy recommendations for future change.

## The Post-1996 Landscape

In 1996, Congress passed two laws — The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[7] and The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[8] — that changed the legal and policy landscape for immigration in the United States. Passage of these laws continued a trend to increase the number and type of crimes — so-called "aggravated felonies" — for which immigrants[9] could be deported.[10]

The 1988 Anti-Drug Abuse Act[11] first introduced the concept of "aggravated felony," a deportable offense, and identified three crimes in this category. By 1990, crimes of violence for which sentences of five years or more were imposed were added to the aggravated felony list,[12] and in 1994 the list of crimes triggering deportation was lengthened to include money laundering, fraud, and theft, if the sentence imposed was five years.[13]

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[4] Joe Costanzo *et al.*, *Evaluating Components of International Migration: The Residual Foreign Born* (U.S. Census Bureau, Working Paper Series, No. 61, Dec. 2001).

[5] Office of Public Affairs, Immigration and Naturalization Service, *INS Releases Updated Estimates of U.S. Illegal Population* (Oct. 1996), www.ins.usdoj.gov/graphics/publicaffairs/newsreels/illegal.htm. Previously, the INS has estimated that about two-thirds of all such immigrants entered without documentation, and the rest overstayed a visa.

[6] Immigration and Naturalization Act (INA) § 212(a)(9)(B)(i)(I) (2001) (an alien who is unlawfully present for 180 days but less than a year is inadmissible for three years); INA § 212(a)(9)(B)(i)(II) (2001) (an alien unlawfully present one year or more is inadmissible for ten years). Waivers are available based on hardship to a citizen or lawful permanent resident spouse or parent; these are solely within the discretion of the Attorney General. Ironically, hardship to children is not a factor. INA § 212(a)(9)(B)(v) (2001).

[7] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (2001) (hereinafter "AEDPA"). The law was passed partially in response to the Oklahoma City bombing and the first World Trade Center bombing.

[8] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (2001) (hereinafter "IIRAIRA").

[9] The term "immigrant" has legal significance and usually refers to a person in legal status in the United States who is a lawful permanent resident. In this chapter, however, we use immigrant more broadly including those who are foreign-born and not citizens. Different rules exist for noncitizens who are lawful permanent residents and for those who are not. These are quite technical, and their elucidation is not necessary to this discussion. *See* INA § 212(a)(2) (2001) for Criminal and Related Grounds for Inadmissibility, and INA § 237(a)(2) (2001) for Criminal Offenses which render an immigrant deportable.

[10] The administrative proceedings created to return an immigrant to his or her native country or a third country have, until recently, been known as "deportation proceedings" and the act of sending a person out of the country as "deportation." Under IIRAIRA, the terms that are now used are "removal proceedings" and "removal." "Deportation" and "removal," and "deportation proceedings" and "removal proceedings," are used interchangeably in this section.

[11] Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690 § 7342, 102 Stat. 4181, 4469 (1988).

[12] Pub. L. No. 101-649 § 501(b), 104 Stat. 4978 (1990).

The 1996 laws added immigration violations, such as document fraud and alien smuggling (with exceptions for immediate family members), to the list of aggravated felonies.[14] Further, the definition was changed such that several crimes now require sentences of only one year, and other crimes, such as alien smuggling and almost all drug crimes, are considered aggravated felonies regardless of the sentence imposed. As of 1996, over 50 crimes can trigger deportation.

In fact, the 1996 laws have created a flood of deportations. For fiscal year 1999, the INS reported a record number of "removals" — 176,000 — of which 62,359 were on criminal grounds and 114,631 were based on non-criminal immigration violations.[15] Criminal alien removals in 1999 increased by 12 percent over 1998, while total removals increased by 3 percent. These figures do not include 72,000 in INS custody who departed voluntarily, and 1.5 million apprehensions and voluntary returns at U.S. borders. Mexicans made up the single largest group deported, followed by Salvadoran, Guatemalan, and Honduran nationals.[16]

Immigrant parents become entangled in the criminal justice/immigration systems in a number of ways. A lawful permanent resident may legally leave the country to visit relatives and upon return be apprehended by INS border officers for crimes from the past. The apprehension is *not* based on outstanding warrants, but rather on any record of a prior conviction that can *now* be considered grounds for removal.[17] Likewise, an immigrant who is applying for lawful permanent residence or citizenship can be placed in removal if the application or fingerprint check reveals a criminal history.

Alternatively, an immigrant may run afoul of the system beginning with a law enforcement encounter. If prior criminal history or undocumented status appears in the course of a law enforcement background check, then the person will be placed in deportation proceedings. In many areas, there has been unprecedented cooperation between local law enforcement officials and INS in identifying "criminal aliens" and placing them in fast-track deportation proceedings, making it extremely difficult for the accused to find representation.[18]

Suspicion of all immigrants may give rise to more initiatives like the one that a group in Anaheim, California, recently proposed. The group wanted their City Council to pass enabling legislation permitting police to check the immigration status of anyone with whom they come in contact, even if no crime has been committed.[19] As opponents of the Anaheim bill point out, giving the authority to the police to act as INS agents would restrict the reporting of crimes, since immigrant victims would fear immigration consequences. The administration and police departments of New York City and Philadelphia recognize this problem and have policies preventing police from reporting crime victims to the INS.[20]

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[13] Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416 § 222(b), 108 Stat. 4305, 5048 (1994).

[14] INA § 101(a)(43)(N) (2001) (alien smuggling); INA § 101(a)(43)(P) (2001) (document fraud).

[15] Office of Public Affairs, Immigration and Naturalization Service, *INS Sets New Removals Record: Fiscal Year 1999 Removals Reach 176,990* (Nov. 12, 1999), www.ins.usdoj.gov/graphics/publicaffairs/newsreels/removal99.pdf (hereinafter "INS Sets New Removals Record").

[16] *Id.*

[17] *See* INA § 101(a)(43) (2001) which provides that the new definitions of "aggravated felony" apply to any conviction "before, on, or after" the date IIRAIRA was enacted (Sept. 30, 1996); see further discussion below. *See also INS v. Enrico St. Cyr, supra* note 1, where the U.S. Supreme Court held that immigrants who pled guilty prior to the enactment of IIRAIRA and who have been rehabilitated are eligible to apply to the immigration courts for special relief to permit them to stay in the U.S.

[18] Office of Public Affairs, Immigration and Naturalization Service, *Fact Sheet – Institutional Removal Program* (Sept. 20, 1999), www.ins.usdoj.gov/graphics/publicaffairs/factsheets/removal.htm (program provides streamlined procedures and special agreements with state and federal prison system so that there is early identification of criminal aliens and removal/deportation proceedings are completed before the end of the criminal sentence). *See also* INA § 241(a) (2001),1.

[19] *Anaheim Faces New Immigration Battle*, L.A. Times, Jan. 23, 2001.

Even upstanding community members express fear and the desire to avoid authorities in a climate like this. Mixed families are often the first to suffer. Studies suggest that fear of deportation or other immigration related consequences may deter immigrant parents from applying for Medicaid or Children's Health Insurance Programs.[22] Partly as a result, U.S. citizen children in mixed families have uninsured rates double those of children whose parents are also citizens.[23]

The legal climate may also have a chilling effect on people seeking to naturalize:

> Yuriy, age 74, entered the United States as a refugee from the Ukraine in 1990. He had survived World War II in Russia and was a decorated Soviet soldier. His extended family, including his wife and grown children, accompanied him. Yuriy was receiving Supplemental Security Income benefits when, in 1996, the new welfare laws initially terminated benefits to refugees and legal immigrants.[23] Because of his intention to remain in the United States for the rest of his life and in order to preserve his only source of income, Yuriy applied for citizenship. His fingerprints were taken and, when he arrived for his citizenship interview, instead of being naturalized Yuriy was placed in deportation proceedings.
>
> As it turns out, Yuriy had been involved in an unfortunate incident stemming from a fender-bender. A passenger of the car he tapped tried to take Yuriy's keys. Yuriy became scared and began to drive away, but the passenger was caught in the door and suffered minor injuries. Yuriy was initially charged with "aggravated assault," pled guilty and was placed under house arrest. Although he never served a day in jail and had no criminal record prior to or since this incident, Yuriy was initially considered an "aggravated felon" subject to deportation to the Ukraine.

As Yuriy's case demonstrates, parents with criminal backgrounds must be careful in applying for citizenship, as such applications can trigger removal for anyone who has ever encountered the criminal justice system. An "aggravated felon" can *never* become a citizen. Denial of citizenship means a person will never be able to vote or hold certain government jobs. In addition, only citizens can apply to bring certain relatives from abroad to the United States. The inability to naturalize thus affects the entire family's well-being.

> C. T., born in Cambodia, is a parent, married with a child. He is a responsible worker and a good father. In his youth, he was involved in a robbery. Several years ago, he sought assistance in applying for citizenship. Although C.T. is not currently being sought by the INS, upon advice, he abandoned his application because it could trigger deportation. C.T. and his family live under the cloud that they may be separated through deportation or indefinite detention.

The discussions that follow describe in more detail some specific interactions between immigration and criminal law in the post-1996 era.

## Deportation for "Aggravated Felonies"

> P.W. is married with a citizen child. He has been a lawful permanent resident since 1985. In 1997, he was convicted in New York of a 5th degree misdemeanor, possession of stolen

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[20] Philadelphia Police Department Memorandum 01-06, *Subject: Departmental Policy Regarding Immigrants* (May 17, 2001).

[21] W. Zimmerman and M. Fix, *Declining Immigrant Applications for Medi-Cal and Welfare Benefits in Los Angeles County* (Urban Institute, July 1998).

[22] *Fast Facts, supra* note 3, at 3.

[23] SSI benefits have since been restored to disabled immigrants and refugees who were already receiving assistance at the time the initial public benefits law was passed. 8 U.S.C.A § 1612(a)(2)(A) (2001).

> property. P.W. was placed in deportation proceedings as an "aggravated felon."

As noted above, one of the most significant changes proceeding from the 1996 laws is that some crimes that used to rise to the level of an "aggravated felony" with a sentence of five years now require a sentence of only one year to earn that distinction. Included in this category are non-violent crimes such as theft or receiving stolen property.[24] New crimes of violence are also in the "one-year" category.

The concept of an "aggravated felony" in immigration has no equivalent in criminal law. In fact, because of the changes in sentencing requirements from five years to one, many crimes that are considered misdemeanors under state law are nonetheless defined as aggravated felonies in immigration law. While Congress may have been attempting through IIRAIRA and AEDPA to develop uniform nationwide standards for criminal activity that would trigger removal, in fact the exact opposite has occurred. Some states impose shorter sentences on a crime than do other states. As a result, a person who commits a crime in a state with a low sentence would not be considered an "aggravated felon" under immigration law, while a person who commits the very same crime in a high-sentencing state would face removal.

An aggravated felon who is deported is barred from entering the United States for life.[25] If she returns and is caught, she faces a 20-year prison sentence.[26] Aggravated felons cannot be granted asylum. If the noncitizen can demonstrate that she will likely face persecution in the country designated for deportation, then she may be granted permission to remain in the United States under the concept known as "withholding" or "restriction of removal."[27] This protective measure is only available for an individual whose prison sentence is less than five years and whose offense is found not to be a "particularly serious crime."[28] Noncitizens whose prison sentence is five years or more, and who may be tortured or suffer similarly cruel treatment if deported to the designated country, can apply to remain in the United States under Article 3 of the United Nations Convention Against Torture. Even if the noncitizen is granted permission (under either method), the INS is not required to release the person into the community: a person granted withholding or protection under the Convention Against Torture can still be detained in prison for some time. The immigrant described below is not an aggravated felon but, like many aggravated felons, is facing prolonged detention because of INS appeals.

> T.S., a national from the Congo, was raped by rebel forces and fled without proper documentation to the United States, hoping to join her husband who had arrived previously as a refugee. Her husband has permanent legal status and is in the process of sponsoring her. T.S.'s attorney won relief under the Convention Against Torture, but because INS has appealed the case, T.S. remains in detention — over 8 months after she arrived in the country. In addition, T.S. was transferred to a detention facility in an isolated rural area without warning to her attorney.

Aggravated felons also can avoid deportation if their conviction is overturned on appeal or if the sentence is vacated on constitutional grounds, if the governor or President issues a pardon,[29] or if a private bill[30] is passed. The last two occurrences are highly unlikely.

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[24] INA § 101(a)(43)(G) (2001).

[25] INA § 212(a)(9)(A)(i) (2001).

[26] INA § 276(b)(2) (2001).

[27] INA § 241(b)(3) (2001).

[28] INA § 241(b)(3)(B) (2001).

[29] INA § 237(a)(2)(A)(v) (2001).

One Philadelphia public defender summarized the situation as follows: "Under the new immigration laws, almost all misdemeanors in Pennsylvania are considered aggravated felonies. The new immigration laws do not distinguish between real criminals and individuals who may get into trouble. They can all be deported now."[31]

## Immigration "Convictions" in the Absence of a Criminal Record

Many states have "rehabilitative statutes," sometimes known as "deferred adjudications," that allow first-time offenders who demonstrate good behavior to have their convictions expunged. Under these laws, a person who completes the period of good behavior is not considered "convicted." An immigrant named Roldan was such a person:

> Roldan had been in the United States since 1982 and had been a permanent resident since 1988. He was charged with possession of marijuana, and, since it was his first offense, he qualified for the deferred adjudication program in his state of Idaho. However, a U.S. Immigration Judge ordered him deported, and, while his appeal was pending, IIRAIRA was enacted. Roldan's deportation was upheld by the Board of Immigration Appeals (BIA), the INS's administrative review body. The BIA argued that Roldan had a conviction by INS standards since he had pled guilty initially, even though he did not have a conviction under state law.

The Ninth Circuit reversed this holding in *Lujan-Armendariz v. INS*,[32] holding that first-time drug offenders whose convictions were expunged were not "convicted" for the purposes of immigration law. The Court was disturbed that a first-time defendant charged under federal law would have not been considered "convicted" under the Federal First Offender Act, but that the same person convicted under a similar state law would be subjected to deportation.

*Lujan* carved out a very narrow exception, for first-time drug offenders. If a person pleads guilty in other situations, and the charge is later expunged, the noncitizen can still be considered "convicted" unless there are further challenges in the federal courts. Although the definition of conviction is very sweeping, there are alternatives. In states like Pennsylvania, for instance, where defendants can participate in a rehabilitation program[33] without entering a plea of guilty or admitting facts to warrant a finding of guilt, there is no conviction for immigration purposes.[34]

## Crimes of Moral Turpitude

IIRAIRA expanded the definition of a "crime of moral turpitude" by including crimes for which a one-year sentence *may be imposed* rather than considering only the sentence that *actually is imposed*.[35] Parents who have not yet secured permanent legal status need not even be convicted to be subjected to deportation proceedings; a parent who "admits having committed, or who admits committing acts which constitute the essential elements" of a crime of moral turpitude is considered inadmissible and can also face deportation.[36]

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[30] 1 Immigration Law Service § 3:179 (2000).

[31] Conversation with Helen Marino, Defender Association of Philadelphia (Jan. 4, 2001).

[32] *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000).

[33] The Pennsylvania Program is known as Accelerated Rehabilitative Disposition (ARD).

[34] *In Re Roldan-Santoya*, Int. Dec. 3377 (BIA 1999), is also instructive about limited instances where dispositions will not be considered "convictions." These include (1) where a state conviction is reversed on appeal on the merits and (2) where a state appeal is reversed because it relates to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings. Because of these exceptions, many immigration lawyers are developing strategies to vacate criminal convictions, thereby eliminating the underlying grounds for the deportation action. *See* Norton Tooby, *Eliminating Criminal Convictions for Immigration Purposes*, in Post-Conviction Relief for Immigrants (2000) (on file at Law Offices of Norton Tooby, Oakland, CA); Dan Kesselbrenner and Lory D. Rosenberg, *Amelioration of Criminal Activity: Post-Conviction Remedies*, in Immigration Law and Crimes (2000); Manuel Vargas, *Defenses to Removal in Criminal Charge Cases*, in Volume II Advanced Practice, Immigration and Nationality Law and Handbook, American Immigration Lawyers Association (2001).

[35] Before the passage of AEDPA, the statute required that a defendant "either is sentenced to confinement or is confined ... for one year or longer." 8 U.S.C. § 1251(a)(2)(A)(i)(II) (1995).

There is no precise definition of a crime of moral turpitude. Under accepted case law, a crime involving moral turpitude is anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties that a man owes to his fellow men, or to society in general.[37] In the immigration context, the BIA looks at the statutory definition of the crime to determine whether "intent" is an element, and not at the gravity of the offense or level of punishment. Many crimes that were forgiven in the past because the sentence rendered was less than one year now fall within the ambit of crimes of moral turpitude if the sentence that *could have been* imposed is one year or more. This is another instance in which a crime in one state may have immigration consequences and lead to removal proceedings while the same crime committed in another jurisdiction may have different results. For example, passing bad checks is not considered a crime of moral turpitude in Pennsylvania, because the Pennsylvania statute does not include "intent" as an element of the crime, while, in Georgia, writing bad checks is considered as such.[38]

IIRAIRA permits some flexibility where the crime of moral turpitude is committed by a person who has been admitted as a lawful permanent resident for five years. One crime committed after the five-year period does not count toward deportation.[39] In addition, a person who has been a permanent resident and resided continuously in the United States for seven years prior to the commission of the crime can ask a U.S. Immigration Judge for "cancellation of removal," a discretionary form of relief permitting a person to reestablish their residency status.[40] Any person committing two crimes of moral turpitude, regardless of when they were committed, is deportable. In Yuriy's case:

> Unfortunately, the incident with the car occurred before Yuriy had been a lawful permanent resident for five years. Due to his immigration lawyer's advocacy and community pressure, the District Attorney agreed to lower his sentence of house arrest to less than one year. This meant that Yuriy no longer fell into the "aggravated felony" category. However, the INS then charged Yuriy with a crime involving moral turpitude because a sentence of one year or more *could have been* imposed, and continued its deportation efforts.

## Immigration Violations as Criminal Acts

In the past, violations of immigration laws were treated as civil matters and adjudicated by the Immigration and Naturalization Service or by the Immigration Court. The 1996 laws provide for increased criminalization of the laws. But, as one report notes:

> Unlike most crimes, immigration crimes do not typically spring from bad motives; many stem from undocumented status itself. In other cases family reunification drives people to commit acts that the immigration laws consider criminal.[41]

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[36] INA § 212(a)(2)(A) (2001).

[37] *Marciano v. INS*, 450 F.2d 1022, 1025 (1971), citing *Ng Sui Wing v. U.S.*, 46 F.2d 755, 756 (7th Cir. 1931).

[38] See Pa. Stat. Tit. 18, § 4105(a)(1); Ga. Code § 16-9-20(a), as cited in Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes*, Appendix E (2000).

[39] INA § 237(a)(2)(A)(i) (2001).

[40] INA § 240A(a).

[41] Catholic Legal Immigration Network, Inc., *Placing Immigrants at Risk: The Impact of Our Laws and Policies on American Families* (2000), available through mmckenna@cliniclegal.org (hereinafter "Placing Immigrants at Risk").

This aspect of the law has disproportionately affected Mexican immigrants, many of whom have documented relatives in the United States:

> At the age of 14, Mr. P., a national of Mexico, entered the United States without inspection. He has two brothers, both lawful permanent residents, who reside in this country. The rest of his family (five siblings and parents) lives in Mexico. Mr. P. attended high school in the United States and in 1995 married a U.S. citizen. Together, they have two U.S. citizen children, ages one and four. Mr. P. has been steadily employed since high school. Prior to his departure from the United States, Mr. P. held three jobs in order to support his family. By day, he worked as a carpenter. At night, he was employed as a cook and a dishwasher in two different restaurants.
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> Although eligible for a family-based visa, Mr. P. has never held legal status in the United States.[42] In early 1998, he returned to Mexico to visit his family. He attempted to reenter the United States in February 1998 by claiming to be a U.S. citizen. He was detained and questioned by U.S. officials. Ultimately, his undocumented status was discovered and U.S. Marshals took him into custody. In June 1998, he was convicted of making a false claim to citizenship. He was sentenced to five months incarceration, leaving his wife to support their two children. Upon completion of his sentence, Mr. P. was deported.[43]

Prosecutions for criminal immigration violations have increased rapidly since the 1996 laws went into effect. The caseload of the Federal Public Defender in El Paso, Texas, reflects this change. In 1999, 29 percent of all criminal cases handled by that office involved criminal prosecutions of immigration violations — many of them illegal reentry cases like the one described above, tried in the federal courts.[44] Immigration violators who are prosecuted face a double bar to family reunification, since they are also deportable as aggravated felons. In fact, 13 percent of the "criminal aliens" deported in 1999 fall into that category.[45]

## Detention

Just as deportations have increased dramatically since 1996, so has the number of noncitizens in INS detention. INS detention is considered a civil matter, and it begins after an individual serves his or her prison sentence or when a person is picked up because of violations of U.S. immigration law. In September 2000, the number of immigrant detainees averaged 20,000, compared to 8,200 in 1997.[46]

> M.C. has had his green card for many years. Twenty years ago, when he was 20, he had a girlfriend who was 17. They thought they were in love. The girl's mother was upset and called the police. M.C. pled guilty to statutory rape charges. At the time, he was told that his plea would not lead to immigration problems. M.C. and his girlfriend went their separate ways and started families.
>
> M.C. was a solid member of the community and owned a restaurant, supporting his wife and children. He was the glue that held his family together. M.C. frequently left the country to visit his family in the Dominican Republic. In 1997, he made the same trip, but when he reentered an INS officer saw the old conviction and took him into custody. M.C.

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[42] Because of the large number of Mexican applicants seeking lawful permanent resident status based on family sponsorship, Mexican nationals must wait longer than other nationals for family-sponsored immigration. For example, it takes about 7 years to sponsor the Mexican unmarried child over 21 of a U.S. citizen parent, compared to 1.75 years to sponsor an unmarried child over 21 from other countries, and an astounding 20 years to sponsor a Mexican sibling, compared to 11 years for other immigrants.

[43] Placing Immigrants at Risk, *supra* note 41, at 47-48.

[44] Donald Kerwin, *How Our Immigration Laws Divide, Impoverish, and Undermine American Families*, 76 Interpreter Releases 1213 n. 25 (Aug. 26, 1999).

[45] INS Sets New Removals Record, *supra* note 15.

[46] *Policy to Protect Jailed Immigrants is Adopted by U.S.*, N.Y Times, Jan. 2, 2001, at 12, col. 1.

> was chained to a radiator in the airport, and later transferred to York County prison in Pennsylvania, 2.5 hours from his home. He was placed in deportation proceedings and remained detained for eight months. While he was in prison, his teenage daughter was involved in a car accident and partially paralyzed. His family was unraveling.
>
> Eventually, with the help of a pro bono attorney, M.C. was released, and the deportation efforts stopped. He is now a U.S. citizen. However, the incident had severe economic and psychological repercussions. His restaurant business was destroyed. Today, over four years later, he still suffers from nightmares.[47]

Under IIRAIRA, many noncitizens who are being deported based on criminal activity are held in mandatory detention until the removal hearing is concluded.[48] If a U.S. Immigration Judge orders deportation, and the immigrant appeals, he or she could *still* remain in detention for years.[49] Even if the noncitizen wins the case and is *not* ordered deported, if the INS then appeals, detention is also often continued. Immigrants in detention are housed in prison facilities under contract with the INS, often far from cities or population centers, making access to counsel difficult, if not impossible. In addition, there have been reported beatings and other forms of mistreatment in several facilities.[50] Detainees may be moved suddenly, without notice to family or attorneys. Since facilities may be hundreds or even thousands of miles away from family members, it may be physically and financially impossible for family members to visit.

Children are devastated by their parents' detentions. Consider, for example, the Pennsylvania boy who told a tearful audience of immigration advocates and relatives of detainees in Washington, D.C.: "If you take away my dad, my family couldn't make it financially.... But more important, I know that I would fall apart. How can I have a future without my father?"[51]

Federal courts have questioned the constitutionality of mandatory detention required by § 236(c) of the Immigration and Nationality Act. In the recent case of *Patel v. Zemksi*,[52] the Third Circuit held that, under certain circumstances, mandatory detention without an individual hearing to determine a person's risk of flight or danger to the community was a violation of due process. This case involved an Indian national who was charged with the "aggravated felony" of alien smuggling when he provided employment and housing for a fellow countryman. Patel was appealing a final order of removal and had been in detention for eleven months. As in the case of other detainees, Patel's time in INS detention exceeded his criminal sentence, which consisted of five months in federal prison and five months home probation.

Among the population of detainees is a group of approximately 4,000 people — known as "lifers" — who have been ordered deported to countries with which the U.S. lacks diplomatic relations or which simply will not accept them.[53] The lifers include people from Cambodia, Iraq, Cuba, China, Vietnam, Laos, and Iran, and many in this group arrived as refugees. While they may have committed minor crimes, these detainees were not sentenced to nor do they deserve lifetime imprisonment.

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[47] The authors are indebted to Stephen Converse, Esq., who litigated this case, for supplying information about it.

[48] INA § 236(a)(1) (2001).

[49] *But see Patel v. Zemski*, 275 F.3d 299 (3rd Cir. 2001), discussed *infra* at note 52 and accompanying text.

[50] *Policy to Protect Jailed Immigrants is Adopted by U.S.*, *supra* note 46.

[51] *Placing Immigrants at Risk*, *supra* note 41.

[52] *Patel v. Zemski*, *supra* note 49.

[53] C. Allen, *The United States' Disregard of International Law in Immigration Policy: Indefinite Detention of Deportable Persons by the INS*, 57 Guild Practitioner 3 n.7 (Summer 2000) (citing Michael Beebe, *Nondeportable Detainees Spend Years of Confinement in Legal Limbo*, Buffalo News, Feb. 6, 2000, at A10).

P.T. was born in Cambodia and came to the United States as an infant. When he was a teenager, he became involved with a group of tough, underachieving youth. P.T. was arrested and convicted of an offense involving marijuana and sentenced to three months in county jail. The INS ordered him deported after his sentence was served, but Cambodia will not permit him to return. At the time of this writing, he has been in detention for three years. His mother and sister are devastated by his imprisonment. Having survived the killing fields of Cambodia, P.T.'s mother must now endure the loss of her son because of a teenage mistake.

L.P. is a Laotian national who, with his mother and eight siblings, arrived in the United States from a Thai refugee camp in the 1980s. His immigration record indicated some mild retardation; his English is limited and he suffers from mental illness. L.P was arrested six years ago, charged with receiving stolen property. Because of his disabilities he was subject to repeated physical assaults while in prison.

After L.P. had served a year and a half on the criminal charge, INS held a removal hearing and ordered him returned to Laos. Laos would not admit him. (It is not clear whether L.P. was represented at the hearing or whether he had access to an interpreter.) INS placed L.P. in detention in rural Pennsylvania, far from his family home in Florida. His mother, who owns a small farm, had relied on L.P.'s labor to keep the farm functioning, and his lengthy detention caused her severe economic distress. After serving an additional 3 years as a "lifer," L.P. was released when a Philadelphia attorney, working pro bono, represented L.P. at a detention interview and advocated for his release under INS detention rules that permit release of detainees who are not flight risks or dangers to the community. L.P. now works on his mother's farm but remains under a final deportation order.[54]

On June 28, 2001, the U.S. Supreme Court in *Zadvaydas v. Davis* curtailed the indefinite civil detention of immigrants.[55] The Supreme Court found that indefinite detention beyond six months was unreasonable if there is no significant likelihood that the immigrant can be returned to his or her native country. However, where an immigrant is likely to commit further crimes, continued confinement can be justified. The Department of Justice was reluctant to release many immigrants after the *Zadvydas* decision, and the events of September 11 have further slowed the release process.

Another category of INS detainees consists of individuals who enter without proper papers. Included in this group are children who arrive without parents and asylum seekers. These immigrants are subjected to procedures known as "expedited removal."[56] Those whom an immigration officer does not believe to have a "credible fear of persecution" have a maximum of seven days to prepare for a hearing before an immigration judge.[57]

## No Appeal to the Federal Courts

For immigrants, the checks and balances that typically reside in the court system are unavailable. IIRAIRA precluded judicial review of mandatory detention of criminal aliens,[58] and AEDPA attempted to eliminate the authority of the courts to review deportation orders against immigrants who are deported on criminal grounds.[59] This kind of "court stripping" was not viewed favorably by the U.S. Supreme Court in its recent decisions in *St. Cyr* and *Zavyadas*,[60] when it upheld the power of federal courts to review decisions of the INS through a writ of habeas corpus.

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[54] Arnold Feldman, Esq., the attorney representing L.P., graciously provided us with the facts of this case.

[55] *Zadvydas v. Davis*, *supra* note 1.

[56] INA § 235 (b)(1)(B)(iii) (2001).

[57] INA § 235(b)(1)(B)(iii)(III) (2001).

[58] IIRAIRA, *supra* note 8, at § 303; INA § 236(e) (2001).

[59] AEDPA, *supra* note 7, at § 440(a); amending INA § 106, 8 USC § 1105 a(a)(100 [*sic*].

In order to file a writ of habeas corpus, however, most noncitizens require legal representation. Unfortunately, most immigrants have no resources to pay a private attorney to handle such a major challenge, and there are no publicly funded legal services for that purpose. Indeed, the law allows an immigrant faced with deportation an attorney only as long as it is at "no expense to the overnment."[61] In 1997, only 11 percent of detainees had legal representation.[62]

## Dismissal of Charges Is Not Enough for People Waiting for Family Sponsorship

There are huge backlogs and long waits to obtain legalization through family sponsorship. One estimate put the number of spouses and children of "green card" holders who have been waiting three years or more at 300,000.[63] There also are thousands of immigrants who receive bad advice or no advice and think that their status is secure when it is not. Immigrants who are in this "line" and are accused of a crime may be able to fight deportation on criminal grounds, but may still be subject to deportation proceedings because they are out of status.

> Oscar (a fictional case, based on case composites) entered the United States with his family in 1993, when he was sixteen. They were fleeing civil conflict in El Salvador. Oscar is now a parent of one child and works as a landscaper. Oscar was stopped by the police and charged with driving a stolen vehicle. The car belonged to Oscar's brother, and all charges were dismissed. Oscar's mother is a citizen, and all of Oscar's siblings are permanent residents. His wife is a permanent resident. But no one in Oscar's family ever filed papers so that Oscar could obtain legal status. Even though the criminal charges were dropped, Oscar has been placed in detention awaiting a deportation hearing because he lacks immigration status.

Under rules operating before 1996, noncitizens could apply for "suspension of deportation" if they could show that they had been present in the United States for seven continuous years. Under IIRAIRA, this form of relief is known as "cancellation of removal" and is much harder to obtain. Now, a person must be continuously present for *ten* years *and* must demonstrate that removal would be an "exceptional and extremely unusual hardship" for a citizen or lawful permanent resident spouse, child, or parent.[64] Since Oscar was not in the United States for ten years before he was placed in deportation proceedings,[65] he faces detention and deportation. Even though an underlying criminal charge may be dismissed, individuals who are here without status still face removal if they cannot meet the ten-year continuous presence standard.

## The Reaction

Since the 1996 laws took effect, there has been increasing concern in many quarters that the changes went too far. Local and national immigration coalitions began a campaign in 1998 to "Fix 96" and worked with immigrant, religious, and political leaders to draw attention to the impact of the laws.

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[60] *INS v. Enrico St. Cyr* and *Zadvydas v. Davis et al.*, *supra* note 1.

[61] INA § 240(b)(4)(A) (2001).

[62] Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* 63-64 (Sept. 1998).

[63] Telephone conference call with the American Immigration Lawyers Association (Jan. 24, 2001).

[64] INA § 240A(b) (2001).

[65] There are special rules for Nicaraguans, Cubans, El Salvadorans, and Guatemalans under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat 2160 (1997), permitting these Central Americans to obtain permanent legal status, if they meet certain conditions, even if they have not been in the U.S. for ten years. As in Oscar's case, however, many individuals failed to apply or have other eligibility problems.

As articles began appearing in the press about long-time residents placed in removal for pulling someone's hair in the distant past or for voting illegally,[66] some members of Congress who had supported the laws called upon the INS to exercise "prosecutorial discretion." On November 28, 2000, the INS issued guidelines calling for discretion in a number of areas, including placing a person in removal proceedings; deciding whether to stop, question, arrest, and detain an individual; and deferring the removal of a person.[67] Factors such as the person's length of residence in the United States, criminal history, and ability to legalize their status eventually, as well as community attention and humanitarian concerns, are included in the guidelines, although the guidelines admit that "[p]rosecutorial discretion is not a full or adequate substitute for the forms of relief previously available from an immigration judge prior to the changes in the law in 1996."[68]

Mandatory detention of "lifers" and others who pose no risk also has come in for criticism. In response, INS issued mandatory detention guidelines requiring an INS District Director to review a detainee's case after 90 days.[69] Still, immigrants often are not represented by counsel at these reviews, and their effect on the release of those in mandatory detention is not yet clear.

Human and civil rights groups, including the American Bar Association, have pressed the INS to develop and implement detention standards. On January 2, 2001, the INS announced that these standards were issued and would be implemented in stages, providing for such basic rights as visits by counsel and telephone access.[70] However, the continued imprisonment of immigrants in distant facilities scattered around the country all but guarantees that low-income immigrants will not have access to representation.

Recognizing that long waits for visas place parents and families at risk, on December 21, 2000, Congress passed the Legal Immigration and Family Equity Act (LIFE), which, among other things, permits relatives to remain in the United States while they wait to become legalized. In addition, LIFE will enable immigrant spouses and children of lawful permanent residents to obtain work permits if they have been waiting for a green card for three years or more.

The Child Citizenship Act (CCA) is another welcome response to the harsh consequences of the 1996 immigration law changes.[71] The CCA focused on permitting children of U.S. citizens to obtain automatic citizenship more easily, without filing additional INS applications. While the impetus for the act came from individuals who had adopted children overseas, believed them to have obtained U.S. citizenship upon adoption, and then were shocked when the children committed crimes and were placed in removal proceedings, the changes reach biological as well as adopted children.[72]

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66 In one case, an immigrant was threatened with deportation because she thought she was a citizen and voted illegally. *For Doing Civic Duty, Immigrant Faces Deportation*, text accompanying CBS Evening News story on Julia Parker, May 8, 2000 (on file with the author); INA § 237(b)(6) (2001) (applies to voting before, on, or after the date of enactment of IIRAIRA).

67 Immigration and Naturalization Service, *Prosecutorial Discretion Guidelines* (2000) (hereinafter "Prosecutorial Discretion Guidelines").

68 *Id.*

69 65 Fed. Reg. 80281-80298 (2000).

70 *Policy to Protect Jailed Immigrants Is Adopted by U.S.*, *supra* note 46.

71 Pub. L. No. 106-395, amending INA §§ 320, 321, and 322.

72 *See* INA § 101(b)(1) in general, and 101(b)(1)(E) and (F) specifically for adopted children provisions.

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The CCA provides for automatic, derivative citizenship for certain individuals as a matter of law. To qualify a person must: (1) enter the U.S. under the age of 18 as a Lawful Permanent Resident, (2) have at least one custodial parent who is a U.S. citizen before the child turns 18,[73] and (3) qualify as a child under the law. The CCA has been interpreted to be non-retroactive and applies only to individuals who were not yet 18 at the effective date of the law (February 28, 2001).[74]

The new laws also have encouraged, in some instances, greater communication between the criminal bar and immigration bar so that the immigration consequences of a plea bargain are understood. Some prosecutors are willing to work with criminal defense attorneys to structure sentences or charges that eliminate immigration consequences, but this occurs strictly on an *ad hoc* basis.

## Policy Recommendations

### Legislative Changes

The INS itself has made the clearest statement of the legislative changes necessary to help immigrant families stay together:

> Ultimately, INS believes that a complete solution requires legislation to restore, to certain aliens affected by the 1996 changes, the possibility of a grant of relief by immigration judges during the removal process.[75]

Before 1996, lawful permanent residents who could demonstrate that they were rehabilitated and who had served sentences of five years or less could request a waiver from deportation through a hearing before an Immigration Judge. That waiver, known as 212(c) relief, was eliminated by AEDPA.[76] The INS statement implies that the restoration of relief such as 212(c) would permit such an individualized determination.

Changes that have already been proposed as legislation, such as The Immigrant Fairness Restoration Act (S. 955), introduced by Senator Kennedy in May 2001, include a roll-back of the sentence required for aggravated felony to five years and a change in the sentencing requirement for a "crime of moral turpitude" from a sentence that "could be imposed" to one "actually imposed." Also included in the bill is the old standard for "cancellation of removal" of seven years residence, reinstatement of eligible immigrants' ability to apply for bond and parole, and the abolishment of many forms of mandatory detention. All these reforms would help keep families together but have not yet been enacted.

Although these policy doors were opening before September 11, 2001, the terrorist attacks appear to have stalled public debate regarding the efficacy of the 1996 changes. It is even more critical since the events of September 11 to distinguish between those methods that effectively weed out terrorists and those that instead detain and deport people who are trying to keep their families together and who have committed minor crimes. Many of the attackers responsible for our national tragedy were on legal visas, and others entered at our borders. The issue is not whether the government has the laws available to detain suspected terrorists or convicted criminals, but rather whether we are able to enforce them effectively.

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[73] Prior law required both parents to be U.S. citizens in most circumstances and otherwise required an application process that many families were unaware existed.

[74] *Matter of Rodrigues-Tejedor*, 23 I&N Dec. 153 (BIA 2001). This decision is being challenged in federal court.

[75] *Prosecutorial Discretion Guidelines, supra* note 67.

[76] AEDPA, *supra* note 7 at § 440(d).

## Administrative Changes

Some of the inroads in mitigating the harms of the 1996 laws were described in the previous section. The INS guidelines on prosecutorial discretion, the guidelines governing detention policies and conditions of confinement, and the detention review procedures all were written in response to public demand. INS is a massive organization, and implementation of these efforts is likely to vary from District to District and among individual detention facilities. Given the small number of detainees who have counsel, INS should enlist the help of non-governmental organizations like the American Bar Association, American Immigration Lawyers' Association, human rights groups, and faith-based organizations in monitoring detention conditions and to determine compliance with new standards.

One change that the INS has *not* suggested and that would dramatically improve monitoring, family unity, and access to legal representation is the relocation of detainees to population centers and cities. However, detention facilities in rural and depressed areas are often at the core of a community's economic development plan, and there is political resistance to changing locations based on this economic reality.

## Legal Services and Funders

Legal services for indigent noncitizens in removal, especially those in detention, can in some instances have a critical impact on their cases. The "no expense to the government" clause in the INA has been interpreted to deny government-funded legal services.[77] Advocates have urged that, because the provision of legal counsel moves cases along and increases efficiency, it is by its nature "no expense." This interpretation was not accepted by the Department of Justice, although the Department did state that funds could be provided to help a noncitizen find an attorney.[78] Renewed advocacy on this issue is needed. Given the government's historical antipathy to providing legal services related to immigration status issues, however, private funding will continue to be essential.

Initiatives that encourage the exchange of information among criminal lawyers, immigration lawyers, and immigration service providers should be supported. Many immigration programs are part of faith-based refugee service programs, and attorneys or other specialists who work with these programs have little knowledge of criminal law. Likewise, criminal lawyers may be uninformed about the immigration consequences of a plea bargain, or the importance of sentence or level of a charge.

Immigrant communities also need education. Many immigrants, especially those who have not had any contact with the criminal justice system for years, are unaware of the potential effects of the new immigration laws.

# Conclusion

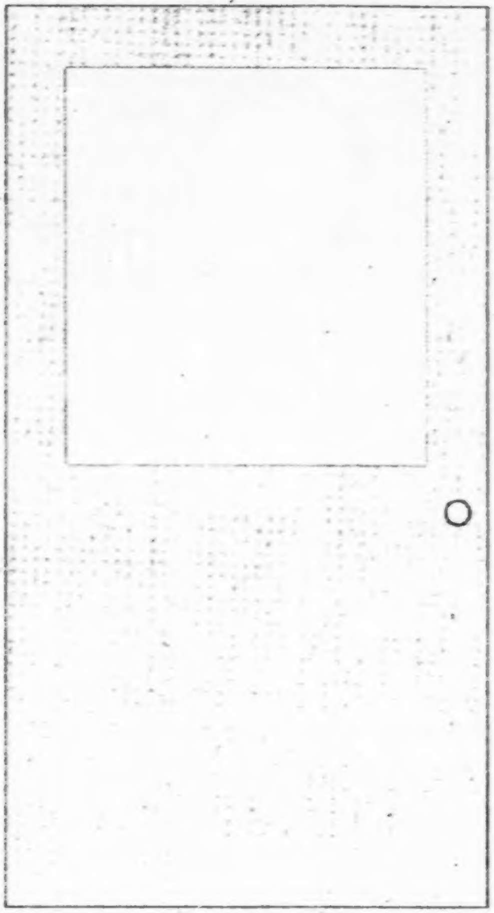
Immigrant families are strong families. Households headed by noncitizens are much more likely than citizen households to contain children — 55 percent, as compared to 35 percent.[79] As mentioned above, nearly one in ten families with children is a mixed immigration status family, where at least one parent is a noncitizen and one child is a citizen.[80] While the vast majority of noncitizen parents will not become involved with the criminal justice system, many parents may, because of a slip in judgment or an incident from the past, be facing deportation, indefinite detention, or denial of citizenship. Legislative changes that restore the balance and fairness in our immigration laws are the only real solution for the thousands of parents facing painful separation from their families.

[77] Donald Kerwin, *Can Charitable Immigration Services Survive?* 74 Interpreter Releases 19 (1997).

[78] *Id.*

[79] *Fast Facts, supra* note 3, at 2.

[80] *Fast Facts, supra* note 3, at 1.



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